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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

C. P. POMEROY,
REPORTER.

VOLUME 87.

WITH

NOTES ON CAL. REPORTS.

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ORGANIZATION OF SUPREME COURT.

[Constitution, article 6, section 2.]

§ 2. The Supreme Court shall consist of a chief justice and six associate justices. The court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions hereinafter contained in relation to the court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred

in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

SUPREME COURT COMMISSIONERS.

[Statutes 1889, page 13.]

SECTION 1. The Supreme Court of the State of California shall immediately upon the expiration of the term of office of the present Supreme Court Commissioners appoint five persons of legal learning and personal worth as Commissioners of said Court. It shall be the duty of said Commissioners, under such rules and regulations as said Court may adopt, to assist in the performance of its duties and in the disposition of the numerous causes now pending in said Court undetermined. The said Commissioners shall hold office for the term of four years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a Judge of said Court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the Constitution of the United States, and the Constitution of the State of California, and to faithfully discharge the duties of the office of Commissioner of the Supreme Court to the best of their ability. The said Court shall have power to remove any and all members of said Commission at any time by an order entered on the minutes of said Court, and all vacancies in said Commission shall be filled in like manner.

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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

[No. 13272. In Bank.—December 10, 1890.]

IN THE MATTER OF THE ESTATE OF WILLIAM G. OSBORN, DECEASED.

ESTATES OF DECEDENTS—TURNING OVER ASSETS TO CO-EXECUTOR—LIABILITY OF EXECUTOR—REASONABLE PRUDENCE.—An executor who has money of the estate in his hands, and turns it over to his co-executor, or who actively assists to put it into the hands of his co-executor, is liable for any misapplication of it by the latter, unless it appears that good reasons existed for turning it over, and that in allowing the co-executor to keep, control, and disburse it he acted in good faith, without notice of any purpose to misapply it, and with reasonable prudence and discretion.

ID.—GOOD FAITH OF PARTIES—OMITTED DUTY—HONESTY OF CO-EXECUTOR.—The liability of an executor for misappropriation of assets turned over to his co-executor depends on the circumstances of each case; good faith alone will not save him from liability, if an omitted duty on his part has occasioned the loss, nor will bad faith on the part of the co-executor subject him to liability, if he has omitted no duty on his part, since he has a right to rely upon the honesty of his co-executor, whether he be rich or poor.

ID.—NEGLECT OCCASIONING LOSS.—An executor or trustee is liable for the wrongful acts of a co-executor or co-trustee, to which he consented, or which by his negligence he enabled the latter to commit, and which he failed to use the means within his power to prevent.

ID.—DUTY OF EXECUTORS TO ACCOUNT—WASTE RESULTING FROM NEGLECT—JOINT AND SEVERAL LIABILITY.—It is the duty of executors to account within reasonable or statutory time, and a neglect to account which results in waste renders the executors jointly and severally liable, the same as in case of failure to collect debts before the statute of limitations has run against them.

ID.—EXECUTOR LEAVING STATE—INSOLVENCY OF CO-EXECUTOR—FINAL ACCOUNT AFTER STATUTORY TIME—LIABILITY FOR MISAPPROPRIATION—An executor who upon departing from the state for an indefinite period left the money and business of the estate in the care of his co-executor, and thereafter took no part in its management, but joined in a final account with the co-executor long after the time allowed by statute for the filing of the account, is liable, upon the insolvency of the co-executor, for the funds appropriated by him to his own use.

APPEAL from an order of the Superior Court of the city and county of San Francisco settling the accounts of executors.

The facts are stated in the opinion of the court.

Cope, Boyd & Fifield, for Appellant.

Selden S. & George T. Wright, for Respondents.

PATERSON, J.—Edmond Saul and the appellant, William E. Straut, were appointed executors of the will of William G. Osborn, and entered upon the discharge of their duties October 28, 1867. The value of the estate for which they accounted was $32,667.20. Claims were presented, amounting in all to only $1,506.74. Nearly all of the heirs and devisees were non-residents, and constituted Hon. Seth M. Richmond, of New York, their attorney in fact, with authority "to collect, receive, sue for, demand, and give acquittances for all legacies, moneys, and property due and payable from the executors and trustees of the estate, and to make and execute full and ample receipts therefor." In February, 1868, Mr. Richmond came to this state, and it was determined by the executors, with his concurrence, to sell beach and water lot No. 588. It was sold for the sum of twenty-three thousand five hundred dollars, ten thousand dollars cash and the remainder on mortgage. The mortgage was assigned to Mr. Richmond, and there was paid to him the sum of fifteen hundred dollars, leaving eight thousand five hundred dollars of the purchase-money received in the hands of the executors. Each executor

deposited one half of that sum—$4,250—to his credit in the Hibernia Savings Bank, receiving a pass-book therefor. Appellant, having been called East on business, delivered his pass-book, containing his account with the Hibernia bank, to his co-executor, and transferred the account to him. Saul drew out the moneys deposited in Straut's name prior to September 1, 1868, and thereafter had the deposit entered in his own book. Richmond was aware of Straut's intention to leave the money and business of the estate in the care of Saul, and made no objection thereto. No account was filed until September 3, 1872, and no procedings were ever taken for its settlement by the executors. No other account or exhibit was filed in the probate or superior courts until 1886, when the executors were, under a citation directed to them, ordered to file a final account of their administration. Straut only was served, Saul being absent from the state. Appellant filed an account on the twenty-seventh day of October, 1886, showing that the only moneys of the estate received by him was said sum of $4,250, deposited in the Hibernia bank, and subsequently turned over to his co-executor, and the further sum of $650, received by appellant in March, and immediately remitted to the attorney for the heirs.

From the time of the issuance of letters to the executors until the sale of beach lot 588, appellant had taken no active part in the management of the estate,—had not received or distributed any of its property. All collections made subsequent to the sale of that lot were made by Saul. Straut was absent from the state from March to October, 1868. During all that time Saul was in business for himself, in good standing and credit in the community. At the time the account was filed, in 1872, appellant knew that there was a shortage in the account of his co-executor, and contributed about $2,500 to make it up, believing himself to be liable for one half of the shortage. When the account of 1872 was rendered,

there was in Saul's hands, belonging to the estate, the sum of $3,714.43, of which $3,066 was collected subsequent to January 1, 1869. Appellant took no part in the management of the estate after his return from the East, in 1868. Saul became insolvent, but the precise time of his insolvency is not shown by the evidence. Appellant states, in his testimony, that he does not know what was the financial condition of Saul at the time the account of 1872 was filed, but he thinks he was then in business for himself; that Saul left this state about seven or eight years ago, and when last heard from was living in Mexico.

The court below held that the appellant was indebted to the estate, as executor, in the sum of $3,716.70, less the sum of $1,000, allowed him as commissions. In view of the fact that there was no intentional wrong on the part of Mr. Straut, the court did not allow interest on the principal sum found to be due the estate.

An executor who has money of the estate in his hands, and turns it over to his co-executor, or who actively assists to put it into the hands of his co-executor, is generally liable for any misapplication of it by the latter. There are exceptions to this general rule; but to avoid liability in such cases, it must appear that good reasons existed for turning over the money to the co-executor, and that in allowing him to keep, control, and disburse it he acted in good faith, without notice of any purpose to misapply it, and with reasonable prudence and discretion. In *Estate of Sanderson,* 74 Cal. 213, the court said: "It has sometimes been broadly stated that if an executor turn over assets which he has received to his co-executor, he becomes responsible for the due application and administration of those assets by his co-executor." There are cases which go to that extent. (*Crosse* v. *Smith,* 7 East, 246; *Douglass* v. *Satterlee,* 11 Johns. 16; *Edmonds* v. *Crenshaw,* 14 Pet. 166.) But this is not a universal rule; there may be circumstances which would render it

not only appropriate, but necessary, to make such a transfer of the assets of an estate by an executor to his co-executor in good circumstances and credit: such as inability to act, by reason of sickness or imprisonment. (*Sterrett's Appeal,* 2 Penr. & W. 419.) The liability of the executor who has thus intrusted to his co-executor the fund for which he was himself primarily responsible, depends upon the circumstances of each case; good faith alone will not save him from liability, nor will bad faith on the part of his co-executor subject him to it.

If good reason existed for turning over the money to his co-executor, and if, in allowing him to keep, control, and disburse it, he acted in good faith, and with reasonable care and prudence, so that it cannot be said those who are entitled to receive it have lost it through his fault or negligence, he will not be held responsible. A wrongful act or omitted duty lies at the foundation of his liability. He has the right to assume, in all cases, that his co-executor is an honest man. The testator by his appointment recommended him as such, and the fact that he is insolvent should create no suspicion upon which to base a want of confidence. An honest executor who is poor is as worthy of confidence and trust as an honest executor who is rich. (*McKim* v. *Aulbach,* 130 Mass. 484; 39 Am. Rep. 470; *Wilson's Appeal,* 115 Pa. St. 101; *Peter* v. *Beverly,* 10 Pet. 534; *Ormiston* v. *Olcott,* 84 N. Y. 346; *Langford* v. *Gascoyne,* 11 Ves. 333.) But where the estate or part of it has been lost through the failure of the executors to perform some duty required of them by the trust, such as to collect debts before the statute of limitations has barred action thereon, to preserve the estate, to prevent waste, etc., they are liable, jointly and severally.

In *Estate of Sanderson,* 74 Cal. 213, the court said: "The obligations of co-executors arise from their contract, and are several. Although one may in some cases make himself liable by placing the other in a position to

do wrong, or by aiding him in his acts of misfeasance, the liability is still the several liability of each. And this is so even if it be conceded the devisees or legatees may under some circumstances claim both to be liable. . . . . If an executor stands by and sees a breach of trust committed, or about to be committed, by a co-executor, and does nothing to protect the estate, or to call the defaulting executor to account, he is liable. . . . . When an executor is guilty of neglect with reference to assets in the possession of his co-executor, he is not made liable upon the theory that the assets are in the possession of both,—which in fact they are not,—but upon his neglect in delivering them to his co-executor without good cause, or in not seeing to it that they were taken out of the possession of the co-executor, or were not by him misapplied or lost."

This decision is in line with current authority, and with the provisions of the code. Section 2239 of the Civil Code provides that "a trustee is responsible for the wrongful acts of a co-trustee to which he consented, or which, by his negligence, he enabled the latter to commit, but for no others." (See also Story's Eq. Pl., sec. 1284, note; *Croft* v. *Williams*, 88 N. Y. 384; *Lincoln* v. *Wright* 4 Beav. 427; *Weigand's Appeal*, 28 Pa. St. 471.)

Applying these principles to the case at bar, we find no way to escape the conclusion that appellant was properly charged with the balance found by the court to be due from the executors on March 17, 1871, less commissions.

There is no doubt that Mr. Straut acted in the utmost good faith in all matters connected with the estate, and that he is a man of high character and excellent repute. There has been no intentional neglect of duty, and it is a matter of regret that his inadvertence, over-confidence, and good nature have brought upon him this loss; but we are not authorized by the hardship of this particular case to depart from well-settled principles, and establish

a precedent which would open an avenue of waste, fraud, and peculation in the management of estates, and for which the guilty parties could not be held accountable.

We cannot say that Mr. Straut was wrong or negligent in placing the money in the hands of his co-executor. He was about to leave the state for an indefinite period. The journey had to be made by sea and land, and was a perilous one. There was nothing to create a suspicion that Saul might misapply the money left with him. There were few claims against the estate, which was one that could have been and ought to have been speedily administered and distributed. Nor was there anything wrong in allowing Saul to manage the estate. Straut had the right to act alone, or not at all, as he chose. He could have renounced the trust entirely,—it is unfortunate for him that he did not do so; but in acting with Saul he made the latter's acts his own, and is bound by them. The delay in the filing of accounts and settlement of the estate was a direct violation of a statutory duty. The executors were required to file an exhibit, under oath, showing the amount of money received and expended by them, the amount of all claims presented, names of the claimants, and all other matters necessary to show the condition of the estate, and to render full account within thirty days after the expiration of the time mentioned in the notice to creditors. Instead of filing an account showing the amount of money received by him, and what had become of it, as he had a right to do to protect himself, and as required by law, Mr. Straut chose to allow four years to elapse without any showing by himself or his co-executor, and then joined in an account with his co-executor, which he adopted as his own, and prayed for its settlement. There is nothing upon the face of the report to show that he had received only the amount of money referred to,—$4,250,—or that he had turned it over to his co-executor. If the facts had been made to appear in that account, the devisees would

have had something to put them upon their guard. Appellant's neglect through a period of nearly twenty years to report to the court his own transactions with respect to the property of the estate was itself negligence, and, taken in connection with the report made by himself and his co-executor, wherein it was made to appear that they had received all the moneys therein accounted for jointly, is sufficient, we think, to render him liable. The court below evidently believed that the loss would not have been sustained if the appellant had exercised reasonable diligence and care in the performance of his duty as executor, and for that reason held him chargeable with the deficiency; and we cannot say that the court erred. In *Adair* v. *Brimmer,* 74 N. Y. 566, the court held that where an executor through his negligence suffered his co-executor to receive and waste the estate, when he had the means of preventing it by proper care, he was liable to the beneficiaries for the waste. In *Thompson* v. *Finch,* 22 Beav. 316, an executor was held liable for failure to see that money was properly invested, although he had been informed by his co-executor that it had been properly invested. The executor in that case allowed a period of ten years to pass without ascertaining what the co-executor had done with the funds, and for such negligence was held liable, although no improper motive was attributed to him. It has been held in a great many cases that it is the duty of executors to account within reasonable or statutory time, and a neglect to account which results in waste renders the executor liable, the same as in case of failure to collect debts, before the statute of limitations has run against them. (*Styles* v. *Guy,* 1 Macn. & G. 434; *Southerland* v. *Brush,* 7 Johns. Ch. 17.) By joining his co-executor in the account of 1872, appellant admitted the joint liability of the executors for the balance then in their hands. If the account had been settled by the court as prayed for by them therein, the order of the court would have been

an adjudication of their joint liability. (*Ducommun's Appeal,* 17 Pa. St. 268; *Haage's Appeal,* 17 Pa. St. 190; *Hengst's Appeal,* 24 Pa. St. 420.)

The fact that the money and the sole management of the estate were given into the hands of Saul with the concurrence of Mr. Richmond is immaterial. (*Edmonds* v. *Crenshaw,* 14 Pet. 166.) Mr. Richmond's power of attorney authorized him only to collect moneys due non-resident beneficiaries, and gave him no authority to direct the management of the estate, or to waive any of the rights of those whom he represented.

The court found that the sum of $3,060 of the balance due from the executors was collected by Saul subsequent to January 1, 1869. From this finding it is apparent that only $654.43 could have been money which appellant turned over to Saul, and as he is entitled to a credit of $1,000 commissions, as executor, he claims that the judgment should have been in his favor.

It is true, said amount of $3,060 of the money turned over by him to Saul was actually and regularly disbursed by the latter in payment of claims and legacies, and if appellant had reported correctly and within reasonable time his transactions, so as to show the court and beneficiaries the limit of his responsibility, he would have been protected. Instead of doing this, however, under a mistaken idea as to his liability, and through fear "that if the matter were exposed in the courts it might seriously affect his credit and the credit of his firm," he failed to disclose the fact that "he, Saul, was not doing right," and that "there was a shortage," borrowed $2,250, which was one half of the amount then due the legatees, and sent it to Mr. Richmond in satisfaction, as he believed, of all claims against him on account of the default of his co-executor. Subsequently, Saul prepared an account showing a balance due to the estate of $3,622.79. Appellant examined the account, and it was signed and filed as the joint account of the two execu-

tors. Upon its face it appeared that the executors had acted jointly in the receipt and disbursement of all the property of the estate, and retained a balance of $3,622.79, including commissions. Here is where appellant made his greatest mistake. The law required prompt reports from both. Instead of reporting his own transaction, and permitting or requiring his co-executor to do likewise, which would have put all concerned upon notice of the several liabilities of each executor, he joined in an account which represented him to be jointly responsible with Saul, although he knew that Saul "was not doing right," and allowed it to slumber on the records for over sixteen years, without any effort to correct it or have it settled. In the mean time his co-executor became insolvent, and left the country, and is now, together with his property, if he has any, beyond this jurisdiction. When appellant discovered that there was a shortage, that his co-executor was not doing right, and was in failing circumstances, it was his duty to the beneficiaries and to himself to report the facts to the court, and procure a settlement of the account; this would have determined the liability of each, and put all concerned upon their guard. The exact time when Saul became insolvent is not shown, but appellant testified that he was in business some time after the account was filed, but that "his reputation was not as good after that time as it was before."

It is an unfortunate case; but upon all the authorities, and upon principle, we must hold the executor responsible when it is so apparent that only his own negligence and mistaken idea as to his liability have occasioned the loss. It would never do to permit an executor to appear to be acting and sharing in the responsibility with his co-executor, join in reports of what they have done jointly, and, many years afterwards, when the co-executor is bankrupt, and out of the jurisdiction of the court, allow him to contradict the reports rendered, and avoid responsi-

bility by showing that as a matter of fact he has done none, or only a part, of the things reported. There is but one safe course for one named as executor to pursue; either renounce the nomination and refuse to qualify, or make prompt and correct reports and accounts of his transactions as executor, and have them settled.

The order is affirmed.

FOX, J., MCFARLAND, J., WORKS, J., SHARPSTEIN, J. and BEATTY, C. J., concurred.

[No. 12900. Department Two.—December 11, 1890.]

R. A. ROBINSON, APPELLANT, v. J. C. MERRILL ET AL., RESPONDENTS.

STREET ASSESSMENT—FORECLOSURE OF LIEN—NECESSARY PARTIES.—In an action to foreclose a street assessment upon a specific tract of land in the city and county of San Francisco, under the act of 1871–72, all of the owners of the property assessed must be made parties defendant, and the lien cannot be enforced against any of the owners, in the absence of another owner who is not joined as a defendant.

ID.—BURDEN OF PROOF—PLEADING—ISSUE AS TO OWNERSHIP—NEW MATTER.—The burden of proof that the defendants sued in such action are the owners of the land is upon the plaintiff, where such ownership is denied by the defendants; and an answer alleging that another person, not sued, owns an undivided interest in the land is in legal effect merely a denial of the averment of the complaint as to ownership by the defendants, and is not an averment of new matter casting the burden of proof upon the defendants.

APPEAL from an order of the Superior Court of the city and county of San Francisco denying a new trial.

The facts are stated in the opinion.

J. M. Wood, and *J. C. Bates,* for Appellant.

George B. Merrill, for Respondents.

BELCHER, C. C.—This action was brought to foreclose a street-assessment lien upon a lot of land in the city and

county of San Francisco. The original complaint was filed in November, 1877, and an amended complaint in March, 1887. The court below gave judgment for the defendants, and the plaintiff appeals from an order denying his motion for a new trial.

The complaint alleged, among other things, that the defendants were the owners of the property assessed. The answer denied this averment, and alleged that "at all the times and dates of the proceedings set forth in the complaint, and particularly on the twenty-first day of May, 1877, the defendant J. C. Merrill and one Moses Ellis, who is not made a party defendant in this action, were the owners in common each of one half part undivided of the land mentioned in said complaint."

At the trial, the plaintiff offered and read in evidence the original contract, assessment, diagram, and warrant, and affidavit of demand thereto annexed, together with the indorsements thereon, showing the due recording of all the papers, and also a deed of J. C. Merrill, by the sheriff of San Francisco, conveying all the undivided one half part of the land in question to his co-defendant, the Hibernia Savings and Loan Society, on the ninth day of July, 1881, which was recorded on the eleventh day of the same month. The plaintiff then rested his case, and the defendants offered no evidence.

The court found that all the allegations of the complaint were true, except as to the ownership of the land, and as to that, "that the defendants were not the owners of said land on the twenty-first day of May, 1877, as alleged in said amended complaint, or at any other time," and as a conclusion of law, that the plaintiff was not entitled to a judgment and decree in his favor, but that defendants were entitled to judgment for their costs.

To maintain his action, it was necessary that the plaintiff make all the owners of the property assessed parties defendant. (*Hancock* v. *Bowman,* 49 Cal. 413;

Clark v. *Porter,* 53 Cal. 409; *Diggins* v. *Reay,* 54 Cal. 525; *Harney* v. *Appelgate,* 57 Cal. 205.)

Whether the defendants were such owners or not was an issue distinctly raised by the answer, and the only question is, On which side was the burden of proof upon this issue? Counsel for appellant contend that the burden was on the defendants to show that they were not the owners of the property, but that Merrill and Ellis were, as alleged in the answer. In support of their contention, counsel cite section 13 of the act, under which the proceedings were taken (Stats. 1871–72, p. 816), declaring what shall constitute a sufficient complaint, and section 17, declaring who are to be regarded and treated as owners, and also the case of *Whiting* v. *Townsend,* 57 Cal. 515.

The portions of the section cited read as follows:—

Sec. 13. "In bringing an action to recover street assessments, the complaint need not show any of the proceedings prior to the issuance of the assessment, diagram, and certificate; but it shall be held legally sufficient if it shows the title of the court in which the action is brought by the parties plaintiff and defendant, the date of the issuance of the assessment, the date of the recording thereof, the book and page where recorded, a general statement of the work done, a description of the lot or lots sought to be charged with the assessments, the amount assessed thereon, that the same remains unpaid, and the proper prayer for relief."

Sec. 17. "The person owning the fee, or the person in the possession of lands, lots, or portions of lots, or buildings, under claim of ownership, or exercising acts of ownership over the same for himself, or as the administrator or guardian of the owner, or the person in whom, on the day the action is commenced, appears the legal title to the land, by deeds recorded in the recorder's office in the city and county of San Francisco, shall be regarded, treated, and deemed to be the owner (for the purposes of

this law), according to the intent and meaning of that word as used in this act."

In *Whiting* v. *Townsend,* 57 Cal. 515, it was held that the complaint was sufficient under section 13 of the statute, but there was no suggestion or intimation that all of the owners need not be joined as defendants; on the contrary, the court, on page 519, said: "The finding of the court below was, that the defendants were the owners in fee of the land at the time the assessment was made, and at the date of the commencement of the action. This is a sufficient finding upon the question of ownership. . . . . The *whole lot* was liable for the *entire assessment,* and no particular part of it was liable for any particular portion of the assessment. The statute requires that the owners of the land, lot, or portion of lot, assessed, shall be sued," etc.

In the section and case above cited we see nothing to sustain the theory of appellant. His complaint undoubtedly complied with the provisions quoted from section 13, but it does not follow because this is so that the necessary parties were made defendants. In a case of this kind the owners of the property assessed, or their representatives, on the day when the action is commenced, must be sued, or the action must fail. Whether the defendants were such owners or not was therefore an issuable fact, and the burden of establishing, by competent proofs, the affirmative of the issue was clearly cast upon the plaintiff. He offered no evidence upon the subject, and his theory seems to have been that the averment in the answer that Merrill and Ellis were the owners was new matter, which relieved him of the burden and cast it upon the defendants. This theory, however, is untenable. The averment referred to was not new matter, but was in legal effect merely a denial of the averment of the complaint as to ownership. (*Goddard* v. *Fulton,* 21 Cal. 436.)

The appellant also says in his brief: "The Hibernia

Savings and Loan Society was the owner of one half, and why not be compelled to pay a half at any rate?" A full answer to this query is found in the cases above cited. In *Clark* v. *Porter,* 53 Cal. 409, and *Diggins* v. *Reay,* 54 Cal. 525, it was distinctly held that in such a case as this, the statute gives no authority for a decree enforcing the lien, in the absence of any of the parties interested.

We advise that the order appealed from be affirmed.

HAYNE, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the order appealed from is affirmed.

[No. 12547. In Bank.—December 11, 1890.]

ERNST LEHMANN, RESPONDENT, *v.* R. SCHMIDT, APPELLANT.

ASSUMPSIT—CONVERSION OF PERSONAL PROPERTY—WAIVER OF TORT.—When one person converts to his own use the personal property of another, the latter may waive the tort, and sue in *assumpsit* for the value thereof.

ID.—WAIVER OF LIEN—CONVERSION BY BAILEE.—If a bailee refuses, upon demand, to deliver the property to the bailor, without setting up any lien thereon, he waives his right to claim a lien after suit brought to recover the value of the property.

ID.—CONTRACT FOR SALE OF WINE—CONVERSION BY FACTOR—REPUDIATION OF CONTRACT.—A factor who receives wine under an agreement to sell it for the owner, and when demand was made upon him fails to assert a lien thereon, and refuses to have anything further to do with the contract, or the sale of the wine, or to deliver or account for it, stating that it was so mixed up with his own wine that he could not make a statement of it, is guilty of a conversion of the wine, and cannot, after suit brought for its value, set up a lien for advances and expenses, as such lien, if any he had, was waived by his action.

ID.—CONTRACT FOR NET PRICE—LOSS ASSUMED BY FACTOR.—Where it was stipulated in the agreement that the owner of the wine was to receive a certain price per gallon, net, for the wine, and the factor agreed to bear the expense of shipping and curing, the factor is not entitled to any allowance for sediment, or for the money expended for freight, labor, and materials.

ID.—EVIDENCE — VALUE — STIPULATED PRICE.—Evidence that the wine would have sold for more than the price stipulated in the contract, if it had been sold at once, taken in connection with the price stipulated in the agreement of sale, is sufficient to justify a finding that the wine was worth the stipulated price at the time of its conversion.

ID.—ASSIGNMENT—ACTION BY ASSIGNEE.—An assignee of all of the bailor's interest in the wine converted by the factor may maintain an action for its value, although the wine converted was only a portion of that consigned.

ID.—SPLITTING OF CAUSE OF ACTION.—The rule against the splitting up of a cause of action is inapplicable to such a case.

ID.—AMOUNT OF RECOVERY—DEDUCTIONS—ADVANCES BY FACTOR—ALLOWANCE FOR CASKS ORDERED.—In determining the amount of recovery from a factor for the value of wines converted by him, there should be deducted from the stipulated price of the wines not only the amount of cash advanced to the bailor by the factor, but also the value of casks and drayage ordered from him by the bailor, the amount of which was charged as an advance under the contract.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The action was brought by the plaintiff, as the assignee of E. B. Smith, in the form of a complaint in *assumpsit* for goods, wares, and merchandise sold and delivered to defendant at his request, viz.: Nine thousand gallons of wine, at twenty cents a gallon, amounting in the aggregate to the sum of eighteen hundred dollars. The defendant denied all of the allegations of the complaint, and set up the following special contract:—

"OFFICE OF R. SCHMIDT, CALIFORNIA WINE GROWERS' AGENT, 304 BATTERY STREET.—MAIN STREET, HELENA, CALIFORNIA.

"SAN FRANCISCO, March 3, 1886.

"Agreement made between E. B. Smith, of Martinez, and R. Schmidt, of San Francisco, as following: —

"1. The said E. B. Smith, having at his cellars of Cordelia about fifty thousand gallons Malvasia and Mission, thirty thousand gallons Zinfandel, and twenty-two thousand gallons Malvasia, agrees to sell his wines through the agency of the said R. Schmidt at the standard price of 20 cents (twenty cents) per gallon, net.

"2. The said R. Schmidt agrees to prepare these

wines into a marketable condition at the rate of 1 cent (one cent) per gallon, and to outlay freight on these wines to this city, amounting about to 1 cent (one cent) per gallon.

"It is further agreed between the parties hereto that all the profits arising out of the sale of these wines over and above the standard price of twenty cents per gallon, and the additional expenses, about two cents per gallon, shall be divided in equal shares between the parties hereto, and the said R. Schmidt agrees to furnish the necessary advances of money in case Mr. E. B. Smith is in want of any, the latter giving the proper time of notification to procure the money; no commissions to be deducted, as the one half of the profit is considered equivalent for all charges and commissions.

"E. B. SMITH.
"R. SCHMIDT."

The defendant pleaded that he had made advances to E. B. Smith, and incurred liabilities for his use and benefit in caring for said wines, and preparing the same for market, and for freight and storage, amounting in the aggregate to $1,478.57, and had received from the sale of wines at his request the sum of $1,124.16, and no more; and alleged that plaintiff sold all but nine thousand gallons of said wines contracted for, through another agency, without defendant's consent, whereby defendant was damaged in the sum of $1,860, in the loss of profits which would have accrued had defendant not been deprived of the opportunity of selling all the wines contracted for.

The court found that the contract pleaded by the defendant was entered into, and that 7,981 gallons of wine were delivered in March and May, 1885, pursuant to the agreement, which were of the value of twenty cents per gallon, amounting to $1,596.20; that defendant advanced for and on account of said wines the sum of $678.50 in cash, and no more; that on the seventeenth day of June, 1886, the defendant refused to proceed further under the

contract, and notified E. B. Smith of his refusal, and refused upon demand to account for any wine sold by him, or to return the wines, but converted the whole of said 7,981 gallons of wine to his own use and benefit, and that sales were subsequently made by the plaintiff, through another agency, with the knowledge and consent of the defendant. Further facts are stated in the opinion of the court.

Chapman & Slack, for Appellant.

An allegation of a cause of action for goods sold and delivered is not supported by proof that the goods were consigned to be sold on commission. (*Evans* v. *Bailey,* 66 Cal. 112.) If the contract of March 3d constituted Smith and the defendant partners with respect to this wine, the present suit fails. (*Morganstern* v. *Thrift,* 66 Cal. 578.) Allegations and proofs must correspond, and unless the facts found are within the issues, the judgment cannot be sustained. (*Murdock* v. *Clarke,* 59 Cal. 683; *Gilman* v. *Bootz,* 63 Cal. 120; *Tomlinson* v. *Monroe,* 41 Cal. 94; *Stout* v. *Coffin,* 28 Cal. 65; *Rowan* v. *Bowles,* 21 Ill. 17.) The plaintiff must recover, if at all, upon the cause of action as set out in his complaint, and not upon some other which may be developed by the proofs. (*Burke* v. *Levy,* 68 Cal. 32; *Mondran* v. *Goux,* 51 Cal. 151.) And when a party proves a contract essentially different from the one declared on, the defendant is entitled to a nonsuit. (*Johnson* v. *Moss,* 45 Cal. 517; Civ. Code, sec. 3336.) The plaintiff could not take a valid assignment of part of wine agreed to be sold under the express contract between E. B. Smith and the defendant. (*Thomas* v. *Rock Island G. & S. M. Co.,* 54 Cal. 578; *Zirker* v. *Hughes etc.,* 77 Cal. 235.) The defendant had a right to retain possession of the wine until reimbursed for advances, expenditures, etc. (Civ. Code, secs. 3051–3053.) There was no evidence of the market value of the wine at the time of conversion. (Civ. Code, sec. 3336.) There

being no claim of title to the property in defendant, the refusal to deliver was no waiver of the lien. (*Pulcifer* v. *Page,* 32 Me. 404; 54 Am. Dec. 582–597.)

A. Heyneman, for Respondent.

Where personal property is tortiously taken, the party aggrieved may waive the tort, and sue in *assumpsit* for the value of the property, and under this theory the action was brought, and the contract admitted in evidence. (*Pratt* v. *Clark,* 12 Cal. 89; *Roberts* v. *Evans,* 43 Cal. 380; *Berley* v. *Taylor,* 5 Hill, 577; Greenl. Ev., sec. 108; *Young* v. *Marshall,* 8 Bing. 43.) An unwarrantable disposal of goods by an agent contrary to the instructions of the principal is a conversion of them by the agent. (Dunlap's Paley on Agency, sec. 79, 80.) A factor or agent is in duty bound to keep the goods of the principal unmixed with his own, and to render a true account. (*Clarke* v. *Tipping,* 9 Beav. 284.) The commingling of the wine by Schmidt with his own, in connection with the evidence as to his refusal to give any account thereof, proves a conversion. (*Pulcifer* v. *Page,* 32 Me. 404; 54 Am. Dec. 582, 591.) A confusion of goods is such a mixture of goods of two or more persons that they cannot be distinguished. (2 Kent's Com. 364; 2 Schouler on Personal Property, 42.) The party whose fault or neglect causes the mixture must bear the whole loss. (*Robinson* v. *Holt,* 39 N. H. 557; 75 Am. Dec. 233; *The Idaho,* 93 U. S. 575; *Alley* v. *Adams,* 44 Ala. 609; *Root* v. *Bonnema,* 22 Wis. 539.) If damages are given to the innocent party, they will be the utmost value of his property. (*Hart* v. *Ten Eyck,* 2 Johns. Ch. 62; *Brackenridge* v. *Holland,* 2 Blackf. 377; *Lord Rokeby* v. *Elliot* L. R. 13 Ch. D. 277.) There was no lien, because no debt was due under the terms of the contract. (Civ. Code, secs. 30, 53; 2 Kent's Com. 635; *Com. Nat. Bank* v. *Heilbronner,* 108 N. Y. 439; *Ract* v. *Duviard-Dime,* 21 N. Y. St. R. 739; *Barry* v. *Longmore,* 12 Ad. & E. 639.) There could have

been no lien for the amount of advances found by the court, because the answer admits receipt of a greater sum from the sales of wines before the alleged conversion. If any lien existed, it was waived by repudiation of the contract, and refusal to redeliver or account for the wines, without the assertion of a lien; and no lien can be asserted after suit brought. (*McPherson* v. *Neuffer,* 11 Rich. 267; *Holbrook* v. *Wight,* 24 Wenw. 178; 35 Am. Dec. 607; *Dows* v. *Morewood,* 10 Barb. 183; *Everett* v. *Saltus,* 15 Wend. 478; *Saltus* v. *Everett,* 20 Wend. 268; *Ætna Ins. Co.* v. *Shryer,* 85 Ind. 363, 366, 367; 1 Addison on Contracts, 421; Overton on Liens, 142; Edwards on Bailments, sec. 448; *Boardman* v. *Sill,* 1 Camp. 410, and note; *Dirks* v. *Richards,* 5 Scott N. R. 534; *Rogers* v. *Weir,* 34 N. Y. 463, 471; *Judah* v. *Kemp,* 2 Johns. Cas. 411; *Leigh* v. *Mobile etc. R. R. Co.,* 58 Ala. 165; *Picquet* v. *McKay,* 2 Blackf. 465; *Bean* v. *Bolton,* 3 Phila. 87; *Scarfe* v. *Morgan,* 4 Mees. & W. 270.) As to waiver of lien in case contract is abandoned, see *Fitzell* v. *Leaky,* 72 Cal. 477; *Sparks* v. *Hess,* 15 Cal. 186; *Blythe* v. *Poultney,* 31 Cal. 238.

PATERSON, J.—The authorities are clear upon the proposition that when one person converts to his own use the personal property of another, the latter may waive the tort, and sue in *assumpsit* for the value thereof. (*Pratt* v. *Clark,* 12 Cal. 89; *Roberts* v. *Evans,* 43 Cal. 380; *Berly* v. *Taylor,* 5 Hill, 577; 2 Greenl. Ev., sec. 108.) But it is contended by appellant that the defendant had a lien on the wine for money paid out and advanced, and that his refusal to comply with the plaintiff's demand did not constitute a conversion. The court found, however, that the defendant advanced on account of said wines, under the agreement, the sum of $678.50, and no more, and that he incurred no other liabilities on account of the wine under the agreement; and the answer of the defendant admits that he had received, "as the

proceeds of the sale of a portion of said wines mentioned in plaintiff's complaint," the sum of $1,124.16. Thus it appears, from the findings, evidence, and admissions of defendant, that he had received more than he had advanced and expended. But if this were not so, the defendant waived his lien, if any he had, for moneys advanced or expenses incurred on account of the wine, by repudiating the contract, refusing to deliver the wine, and by declining to account to Smith for the amount received or expended. It has been held in England that a person having a lien on goods does not waive it by the mere fact of his omission to state that he claims them in that right when they are demanded; but if a different ground of retention than that of the lien be assumed, the lien ceases to exist. In this country the weight of authority seems to support the contention that if the bailee refuse, upon demand, to deliver the property without setting up any lien thereon, he waives his right to claim a lien after suit brought. (*Hanna* v. *Phelps,* 7 Ind. 24; *Everett* v. *Saultz,* 15 Wend. 478.) In the case at bar, it is true, the defendant was not merely a bailee for service; he was also a factor to sell; but he not only failed to assert a lien on the wine for advances and expenses at the time a demand was made upon him, but he notified Smith "that he would not have anything more to do with the contract," refused to go on with the sale of the wine or have anything further to do with it, and refused to deliver possession of the wine or make any accounting in relation thereto. He stated to one of the witnesses that he could not tell anything about the wine, as "it was so mixed up with his own wine that he could not make a statement of it." Upon this evidence the court was justified in finding that there was a conversion of the property, and that defendant waived his lien, if any he had. (Civ. Code, sec. 29; *McPherson* v. *Neuffer,* 11 Rich. 267; *Ramsby* v. *Beezley,* 11 Or. 49; Overton on Liens, sec. 115, p. 142.)

We do not think that the defendant is entitled to any allowance for the 230 gallons of sediment, or for the money expended for freight, labor, and materials. He knew when he took the wine that there would be some sediment and waste in curing it, and it was stipulated in the agreement that plaintiff was to receive twenty cents per gallon, net. He agreed to furnish the necessary labor and outlay for freight, labor, etc., in shipping and curing the wine. It is admitted that he received the 7,981 gallons of wine with which the court charged him, and having converted it all to his own use, any expense or loss incurred in getting possession of that quantity in improving its quality must be borne by himself.

The finding of the court as to the value of the wines is supported by the evidence. Mr. Smith testified that if the defendant had sold the wine at once "he could have realized a great deal more than twenty cents per gallon, for wines were very high at that season; but his neglect and delay caused me a great loss." Furthermore, it was stipulated in the contract, as stated above, that plaintiff should receive twenty cents per gallon, net; and, under these circumstances, having converted it to his own use, we think the price stipulated in the agreement is some evidence of the value of the property at the time of the conversion.

The point was made that the assignment to the plaintiff did not entitle him to maintain this action, but we think it is sufficient to support an action for the value, although it be for only a portion of the wines referred to in the agreement. The rule against the splitting up of the cause of action (*Zirker* v. *Hughes,* 77 Cal. 235) is inapplicable to this case.

The findings of the court are supported by the evidence, with the exception of the fourth finding which states that defendant incurred no other liabilities and made no other advances than the $678.50 cash advanced to Smith. The latter testified that he received from the

defendant the sum of $678.50 in cash, and some casks that he had ordered from the defendant. The defendant testified that the casks referred to were furnished at the request of Smith, and were worth the sum of $39.55, including drayage, which amount was charged to Smith as an advance under the contract. It is clear, therefore, that the defendant should have been allowed that amount as an offset, in addition to the $678.50.

The cause is remanded, with directions to the court below to modify the judgment, by inserting therein *nine hundred and twelve dollars and ninety-five cents,* instead of the words and figures "nine hundred and fifty-two and fifty hundredths ($952 50-100) dollars." As so modified, the judgment will stand; but the respondent will be taxed with the costs of this appeal.

ATTY, C. J., MCFARLAND, J., FOX, J., SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 12768. Department One.—December 12, 1890.]

THE NORTHERN RAILWAY COMPANY ET AL., RESPONDENTS, *v.* MICHAEL JORDAN ET AL., APPELLANTS.

BOUNDARY — NATURAL MONUMENTS — SHORE LINE — COURSES AND DISTANCES.—Where there is a conflict between the natural boundary, or shore line, and the line as given by courses and distances in the description of land, the former must control.

PLEADINGS—SUPPORT OF JUDGMENT—APPEAL.—A judgment cannot be rendered which will settle rights between litigants, unless the pleadings are framed to support it.

EJECTMENT—VERDICT AND JUDGMENT—UNCERTAIN DESCRIPTION—APPEAL.—In an action of ejectment, a verdict, and judgment based thereupon, that plaintiff is entitled to the possession of land described by boundaries not corresponding to the complaint or answer, or to any documentary evidence in the case, and not mentioning any natural monuments, nor fixing the location of the lands, directly, or by reference to anything in the record, or elsewhere, will be set aside upon appeal for uncertainty in description.

ID.—SUBSTITUTION OF PLAINTIFF—AMENDED COMPLAINT—EVIDENCE OF TITLE—CONVEYANCE PENDENTE LITE—SUPPLEMENTAL PLEADING.—The vendee of a plaintiff in ejectment who is substituted as plaintiff under an order of court providing that all the allegations and denials of the pleadings should apply to him if the complaint as amended alleges that he was the owner at the time of bringing suit, must stand upon such allegation, and prove himself the owner at that time, and evidence is inadmissible of a deed from the original plaintiff to him, executed after the commencement of the action.

ID.—EVIDENCE—DISPUTED BOUNDARY—CALL OF PATENT—QUESTION FOR JURY.—In an action of ejectment, where a question of disputed boundary is involved, evidence tending to show the location of a certain house, which was one of the calls of a United States patent issued to the defendants, is admissible, the question whether the evidence is sufficient to prove such fact being for the jury to determine.

VERDICT AGAINST LAW—INSTRUCTIONS—QUESTION OF FACT.—A verdict cannot be said to be against law, as contrary to the instructions of the court, because inconsistent with the facts as maintained by one party, if the jury might, upon the evidence, have decided the question of fact contrary to such party, and consistently with the instructions.

TIDE-LANDS—CERTIFICATE OF PURCHASE—PATENT—CURATIVE ACT—CASE AFFIRMED.—A certificate of purchase of tide-lands, issued prior to the curative act of March 27, 1872, was validated by that act, and a patent from the state for such lands, issued subsequent to the passage of that act, and pursuant to the prior certificate, vests title in the patentee. (*Upham* v. *Hosking*, 62 Cal. 250, affirmed.)

APPEAL from a judgment of the Superior Court of Contra Costa County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

J. M. Seawell, and *Reinstein & Eisner,* for Appellants.

L. B. & L. Mizner, and *E. R. Chase,* for Respondents.

Fox, J.—Action in ejectment. Judgment for plaintiffs; motion for new trial denied, and defendants appeal from both the judgment and order.

Plaintiffs deraign title under a certificate of purchase of tide-lands from the state, issued November 9, 1871, to L. B. Mizner, followed by patent issued June 14, 1877. Defendants deraign title under a United States patent for the rancho Canada del Hambre de Bolsas, and a

deed conveying the land in Little Bull Valley down to the shore of the straits of Carquinez, in Contra Costa County.

There is no question but that the patents are coterminous, the lands described in the one being bounded by the lands described in the other, at and along the point under investigation in this case; but the point is, Where is that coterminous line? Both patents give as a general description "the shore of the straits of Carquinez," and in both patents this general description is followed by a specific one of courses and distances, and each corresponding to the other in such courses and distances. As matter of law,—and that seems to be conceded as law in this case,—if there is a conflict between the natural boundary, or shore line, and the line as given by courses and distances, the latter must yield to the former. The correct location of the shore line is therefore the matter to be ultimately determined in this case; but it will have to be determined upon another trial; for the verdict rendered upon this trial, in our judgment determines nothing, and cannot stand.

As the case will have to go back for a new trial, we suggest, preliminarily, that either the verdict or the complaint is all awry as to the points of the compass at the place under consideration. The exhibits which are brought up to us indicate that the first fault is in the complaint. If so, the new proceedings in the court below ought to commence with an amendment of that complaint; for it can hardly be expected that a judgment can ever be reached which will settle rights between litigants, unless the pleadings are framed to support it. It may also be found advisable to amend it for another reason, which will hereafter become apparent.

1. The first point made by appellants is, that the verdict and judgment are erroneous, for uncertainty of description. The verdict reads as follows: "We, the jury, find that the plaintiff is entitled to the possession of the

land described within the following boundaries: Commencing at point (A), on the west line of railroad right of way, running west at right angles with right of way line (70) seventy feet, thence a southeasterly direction to a point on the west line of right of way, thence northerly along said right of way line (180) one hundred and eighty feet, to the point of beginning."

That is all there is of the verdict, save the signature of the foreman. There is nothing in the complaint, or in any part of the judgment roll, which corresponds in any particular with this verdict, or from which it could be determined that the verdict referred to the whole or any part of the land described in the complaint, or in the answer, or even to any lands described in either of the patents, or any of the deeds offered in evidence. Place the description given in any of the pleadings, or of the title papers offered in evidence, side by side with this verdict, and it would be impossible to tell even that the lands were located in the same state, much less that they, or any part of them, were the same. Point A is not a monument, and there is nothing of record anywhere by which it can be located. The judgment conforms to the verdict, and does not improve upon it in this regard.

This verdict, and the judgment based on it, is clearly insufficient, under the rule laid down in *Crosby* v. *Dowd,* 61 Cal. 602, affirmed in *Emeric* v. *Alvarado,* 64 Cal. 621, and in *Hill v. Wall,* 66 Cal. 132. But it is claimed that *Crosby* v. *Dowd,* 61 Cal. 602, was overruled in *De Sepulveda* v. *Baugh,* 74 Cal. 470; 5 Am. St. Rep. 455. In the latter case it was held, modifying *Crosby* v. *Dowd,* 61 Cal. 602, that a judgment is not void for uncertainty because of the fact that it refers to some other paper for description. But it was still held that such a judgment may be erroneous, and subject to correction on appeal, even though it could not be held void on collateral attack, so long as there was some other paper, matter of record, to

which reference might be had for description. But even under that decision this verdict is not good; for it refers to nothing of record, or elsewhere, to which resort may be had for the purpose of locating the lands here attempted to be described. Respondents say the jury had before them during the entire trial, and in their jury-room, a diagram, upon which point A was distinctly marked. Suppose they had; they have not referred us to that diagram, and if they had, the diagram is not a part of the record; it may be found to-day; it may be impossible to find it to-morrow; and when found, it would be impossible to apply it with absolute certainty to any particular tract of land.

2. The action was commenced by the Northern Railway Company and A. J. Bryant as plaintiffs. Some time afterwards, upon the request of Bryant and of Floyd-Jones, the latter was substituted in the place of Bryant as plaintiff, and it was ordered that the name of Bryant be stricken from the complaint, and the action continued in the name of Floyd-Jones as plaintiff, "and that all the allegations and denials of the pleadings apply to said Floyd-Jones, and not to said Bryant, and that the said complaint be amended by striking out the name of said Bryant, and inserting in the place thereof the name of said Floyd-Jones."

Floyd-Jones having succeeded by transfer to the interest of Bryant, he had a right to be substituted as plaintiff if he desired to do so (Code Civ. Proc., sec. 385); but the method of doing it was a singular and unfortunate one. It left him to stand upon an allegation, and bound to prove that he was the owner, or at least entitled to the possession, at the time the complaint was filed, neither of which was true. The court did err, therefore, in admitting in evidence under the pleadings as they stood the deed from Bryant to Floyd-Jones. It was incompetent, irrelevant, and inadmissible for the purpose of proving any issue in the cause. The difficulty would

have been obviated by a proper supplemental complaint.

3. It was not error for the court to admit evidence tending to show the location of the John Travers house. That was one of the calls of the United States patent, and the parties were entitled to show where it was if they could. Whether the evidence was sufficient to prove the fact was for the jury to determine.

4. We do not think the point that the verdict is against law, because in disobedience of the instructions of the court, is sustained. The jury are of course bound to take the law from the court, but it does not appear that they did not do so in this case. Under the instructions, the real question was one of fact: Where was the high-water-mark? It does not follow, because the jury and the counsel do not agree upon that question of fact, that the jury disregarded the instructions of the court.

5. The point is also made that the evidence is insufficient to justify the verdict. As the case must be tried anew, we deem it improper for us at this time to discuss that question.

6. It is also claimed that the certificate of purchase and state patent to Mizner are void. We regard this contention as settled adversely to appellant by the decision in *Upham* v. *Hosking,* 62 Cal. 250,—a case which seems to be directly in point.

Judgment and order reversed.

PATERSON, J., MCFARLAND, J., SHARPSTEIN, J., and THORNTON, J., concurred.

WORKS, J., concurred in the judgment.

[No. 13695. Department Two.—December 12, 1890.]

JAMES BIDWELL, RESPONDENT, *v.* E. S. BABCOCK, JR., APPELLANT.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—PLEADING.—The complaint in an action to enforce the liability of stockholders for the indebtedness of a corporation must state the proportion which the stock owned by the defendant at the time the debt sued for was incurred bears to the whole subscribed stock at that time, or facts from which such proportion may be deduced.

ID.—ACTION FOR SEVERAL DEBTS — PLEADING — DEMURRER — SUBSCRIBED STOCK.—A complaint in an action to enforce several debts of a corporation against a stockholder which states the number of shares owned by the defendant during the period in which the debts sued for were incurred, and that during that period a certain number of shares were subscribed for, issued to, and owned by various parties, without stating that that number was the whole number of shares of stock subscribed at the time each debt was contracted, or stating the proportion which the shares owned by the defendant bore to the whole subscribed stock at each of said times, is insufficient, and a demurrer thereto should be sustained.

ID.—SEVERAL COUNTS IN COMPLAINT—DEFECTIVE PLEADING.—A complaint containing several counts upon several debts of a corporation with which a stockholder is sought to be charged must state in each count the existence of the corporation, and the facts showing the defendant's proportionate share of liability for each debt, or must refer to the statement of these facts in the first count; and defects in such statement in subsequent counts cannot be supplied by statements in the first count, in the absence of reference to them.

APPEAL from a judgment of the Superior Court of San Diego County.

The facts are stated in the opinion.

Hunsaker, Britt & Goodrich, for Appellant.

Alexander G. Watson, and *W. J. Walker,* for Respondent.

VANCLIEF, C.—The defendant was sued as a stockholder of a corporation,—the San Diego Street Car Company,—under section 322 of the Civil Code, to recover his proportionate part of certain alleged indebtedness of the corporation. His demurrer to the complaint was

overruled, and upon his failure to answer, judgment was rendered against him by default. This appeal is from the judgment on the judgment roll, and the overruling of the demurrer is assigned as error.

The complaint embraces three cause of action: 1. Indebtedness of the corporation for goods sold and delivered by the plaintiff "during the time" between December 6, 1888, and January 23, 1889; 2. Indebtedness of the corporation to H. L. Shaug, for goods sold and delivered by him, *during the same time,* assigned to the plaintiff; and 3. Indebtedness of the corporation to Morris and Breadlove for goods sold and delivered by them *during the same time,* assigned to plaintiff. The indebtedness of the corporation, alleged in the three causes of action, amounts to $858.72.

After properly stating the organization of the corporation, its existence during the time within which the indebtedness was incurred, and that its whole capital stock consisted of two thousand five hundred shares, of the par value of one hundred dollars per share, the complaint proceeds as follows:—

"4. That a large number of shares of said stock, to wit, 2,170, was subscribed for, issued to, and owned by the various parties who were the owners of said stock, as hereinafter specified, during the time between the sixth day of December, 1888, and the twenty-third day of January, A. D. 1889, both days inclusive, between which dates the debts hereinafter set forth were incured."

Then, after alleging the indebtedness of the corporation as above indicated, comes the ninth paragraph, as follows:—

"9. That during the time mentioned in paragraph 4 of this complaint, to wit, between December 6, 1888, and January 23, 1889, the defendant, E. S. Babcock, Jr., was the owner of, to wit, 972 shares of the capital stock of said San Diego Street Car Company, and is indebted to

plaintiff herein in the sum of, to wit, $384.91, under section 322 of the Civil Code of California, and other laws of the state of California; that said sum has been demanded of defendant, but he has refused to pay the same, or any part thereof."

The allegations as to the organization and existence of the corporation, the amount of its whole capital stock, and in regard to the portion thereof subscribed, and the portion thereof owned by the defendant, are made only in connection with the first cause of action. None of them is repeated or referred to in connection with the second or third cause of action, as alleged in paragraphs 7 and 8 of the complaint.

The grounds of the demurrer are stated as follows: "1. That the said complaint does not state facts sufficient to constitute a cause of action; 2. That the said complaint is uncertain, ambiguous, and unintelligible in this, that it does not appear therefrom what number of shares of the capital stock of the San Diego Street Car Company had been subscribed for at the time of the creation of the alleged indebtedness mentioned in said complaint; nor does it show what proportion the amount of stock and shares of stock alleged to be owned by the defendant bears to the whole of the subscribed capital stock of the San Diego Street Car Company; nor does it show what proportion the stock of the defendant bore to the whole subscribed stock of said company at the time of the creation of such alleged indebtedness; nor does the said complaint show what proportionate part of each of the several sums of indebtedness of the San Diego Street Car Company shown in said complaint is the liability of the defendant.

"2. Defendant also demurs to that portion of said complaint contained in the paragraph thereof numbered 7, upon the ground that the same attempts to set forth a separate cause of action against this defendant, and that the same does not state facts sufficient for that purpose.

"3. On the same grounds stated in the above specification of demurrer No. 11, the defendant demurs to that part of the plaintiff's complaint contained in the paragraph thereof numbered 8."

The constitution of 1879 (art. 12, sec. 3) provides: "Each stockholder of a corporation . . . . shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation."

Section 322 of the Civil Code, as construed by this court, has substantially the same meaning and effect as the above quotation from the constitution.

1. It is essential to the statement of a cause of action, under this provision of the code and constitution, that the complaint state the proportion which the stock owned by the defendant at the time the debt sued for was incurred bears to the whole *subscribed* stock at the same time, or that it state facts from which such proportion can be deduced. But the complaint in this case states neither the proportion, nor facts from which it may be deduced. In this case, the required proportion cannot be ascertained by any process, without a knowledge of the whole number of shares of "the subscribed capital stock" existing immediately before and at the time each debt sued for was contracted or incurred. This knowledge, however, is not communicated by the complaint. To affirm, as in the fourth paragraph of the complaint, that 2,170 shares "were subscribed for, issued to, and owned by the various parties who were the owners of said stock during" a specified period of forty-nine days, within which the debts were contracted, is no limitation upon the number of shares subscribed for and owned during a proportion of that period, within which the debts, or some of them, may have been incurred, since the debts may have been incurred at different

points of time within that period, and all may have been incurred on the last day of the period. Nor, indeed, does the averment limit the number of subscribed shares owned prior to and during the entire period specified. It is perfectly consistent with an averment that all the capital stock of the corporation (2,500 shares) was subscribed and owned by various persons prior to the specified period, and also consistent with an averment that the remainder of the stock (330 shares) was subscribed and owned on the third day of the period, and thence until the close of the period. Therefore, for aught that is alleged in the complaint, 2,500 shares may have been subscribed for prior to the period specified, and certainly that 330 shares, in addition to the 2,170, may have been subscribed within that period, and prior to the creation of the debts sued for. The averment relates only to subscribed stock that existed during the whole period of forty-nine consecutive days. It neither affirms nor denies, expressly or by implication, that an additional number of shares of subscribed stock existed during the last forty days of that period; yet, according to paragraphs of the complaint numbered 5, 7, and 8 all the debts sued for may have been incurred within the last forty days of that period. The complaint should have averred, in substance, if the fact was so, that there were 2,170 shares of subscribed stock, *and no more,* at the time each debt was incurred.

2. The second and third counts are defective in that they fail to state the existence of the corporation, the amount of its capital stock, the portion thereof subscribed, or the portion of the subscribed stock owned by defendant, or to refer to the statement of these facts in the first count. The defects in the second and third counts are not supplied by statements in the first count, in the absence of any reference to them in the second and third. (*Haskell* v. *Haskell,* 54 Cal. 262; *Barlow* v. *Burns,* 40 Cal. 351.)

I think the judgment should be reversed, and the cause remanded, with instruction to sustain the demurrer.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is reversed, with instructions to sustain the demurrer.

[No. 13699. Department Two.—December 12, 1890.]

CLARA SAUER, APPELLANT, v. PAUL MEYER, RESPONDENT.

EJECTMENT—EVIDENCE—RIGHT OF POSSESSION.—To maintain an action of ejectment, the plaintiff must show that he was entitled to the possession of the demanded premises at the time he commenced the action.

ID.—LANDLORD AND TENANT—FORFEITURE OF LEASE—NON-PAYMENT OF RENT—DEMAND—RIGHT OF RE-ENTRY.—To give a landlord a right of re-entry for non-payment of rent, a demand of the rent, upon or after the last day on which the lessee has to pay, is essential to complete the forfeiture and enable him to maintain an action of ejectment.

ID.—FORFEITURE NOT FAVORED.—Forfeitures are not favored; and where the right of possession of the landlord depends upon the forfeiture of the lease, the conditions of the lease involving the forfeiture must be strictly interpreted against him.

ID.—WAIVER OF FORFEITURE—EXTENSION OF TIME FOR PAYMENT.—An agreement that rent due for several months shall stand unpaid until a future month is a clear waiver of any forfeiture for non-payment of rent during those months, and no right of re-entry could accrue until the time stipulated in the lease has elapsed after demand of rent at the expiration of the extended time.

ID.—PREMATURE ACTION AGAINST SUBLESSEE.—Under a lease providing for the payment of rent monthly in advance, and for a right of re-entry by the landlord if any rent should be due and unpaid for ten days after the same should have been paid, and giving the lessee the right to sublet, where the lessor agreed with the lessee that the rent due for three months should stand unpaid until the first of the next month, and demanded of the sublessee the rent due on the first of such month, an action of ejectment against the sublessee, commenced four days after the demand, is prematurely brought.

APPEAL from a judgment of the Superior Court of San Luis Obispo County.

The facts are stated in the opinion.

J. M. Wilcoxon, for Appellant.

Graves, Turner & Graves, for Respondent.

BELCHER, C. C.—This is an action of ejectment. The court below gave judgment for the defendant, and the plaintiff appeals on the judgment roll.

The facts of the case, as bound by the court, are in substance as follows: In November, 1883, the plaintiff leased the demanded premises for the term of ten years and one month from the first day of December following, the rental during the last five years of the term to be "forty dollars per month, payable in gold coin on the first of each and every month, in advance."

The lease provided that at the expiration or sooner determination thereof the lessees should have the right to remove from the premises all improvements placed thereon by them, and to sublet the premises, or any part thereof, and "that if any rent shall be due and unpaid for the period of ten days after the same should have been paid under the conditions hereof, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and remove all persons therefrom in the manner prescribed by law."

During the year 1889, the defendant was in possession, as sublessee, of one half of the leased premises. On the first day of October of that year, the whole rent, $120, for the months of August, September, and October was then due and unpaid, and on that day the plaintiff agreed orally with the plaintiff's lessor, who was one of the original lessees, that the same should stand unpaid until the first day of November following.

On the first day of November the plaintiff demanded of the defendant the payment of all rents then due, and the defendant denied that he owed plaintiff, and refused to pay anything.

On the fourth day of the last-named month, this action was commenced, and on that day, before defendant knew of its commencement, he offered to pay the amount due plaintiff for rent under the lease, and asked the amount due, and told her he was ready to give her a check for the same on a local bank, in which he had money sufficient to pay the sum due. The plaintiff refused to tell defendant the amount due, but made no objection to the offer of payment by check.

On the twenty-sixth day of November, and before defendant filed his answer herein, he offered in writing to pay to the plaintiff the sum of $160, in gold coin, the same being the amount due for rent under the lease up to and including that month, and the plaintiff refused to accept the same, but specified no objection thereto.

The case was tried in December, and on the trial thereof, and before its submission, the defendant brought into court, and delivered to the clerk of the court, for the use of the plaintiff, the sum of $220, the said amount being more than enough to pay all the rent then due and the costs of the suit.

The value of the improvements placed on the premises by the lessees is five thousand dollars.

Upon these facts, we think the defendant was entitled to have judgment entered in his favor.

To maintain an action of ejectment, the plaintiff must show that he was entitled to the possession of the demanded premises at the time he commenced his action. (*Hestres* v. *Brennan,* 37 Cal. 385; *Sacramento Savings Bank* v. *Hynes,* 50 Cal. 195.) The appellant here claims that she had a right to recover, because there had been a forfeiture of the lease for non-payment of rent.

Forfeitures are not favored; and our Civil Code con-

tains this provision: "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." (Sec. 1442.)

To give a landlord a right of re-entry for non-payment of rent, a demand of the rent, upon or after the last day which the lessee has to pay, is essential to complete the forfeiture, and enable him to maintain an action. (Taylor on Landlord and Tenant, 8th ed., sec. 297; Wood on Landlord and Tenant, 2d ed., sec. 514.)

It does not appear here that any demand for the payment of the rent due in August and September was made during those months; and the agreement of October 1st, that the rents for August, September, and October should stand unpaid until November 1st was a clear waiver of any forfeiture if demand had been made.

The plaintiff demanded on November 1st that the defendant pay all the rents then due; and conceding that this demand was sufficient, and that the rents should then have been paid by defendant, notwithstanding he was only a subtenant of half the leased property, still, no forfeiture then occurred, or could occur, until the expiration of ten days thereafter, for the reason that the lease only provided that the lessor should have the right of re-entry in case "any rent shall be due and unpaid for the period of *ten* days after the same should have been paid."

As the action was commenced four days after the demand, it was evidently prematurely brought. Other grounds are urged for the affirmance of the judgment, but they need not be considered.

We advise that the judgment be affirmed.

FOOTE, C., and HAYNE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 13690. Department Two.—December 12, 1890.]

JOHN S. URTON, RESPONDENT, *v.* GEORGE WOOLSEY, APPELLANT.

FORECLOSURE OF VENDOR'S LIEN—VENUE OF ACTION.—An action to foreclose a vendor's lien must be commenced in the county in which the land, or some part thereof, is situated.

ID.—JURISDICTION—APPEAL FROM JUDGMENT.—The superior court of a county in which it is sought to foreclose a lien upon real property situated in another county has no jurisdiction over the case, and no authority to enter judgment therein, and a judgment enforcing the lien will be reversed upon appeal, for want of jurisdiction.

APPEALS from a judgment of the Superior Court of Fresno County, from an order refusing a change of venue, from an order refusing to set aside a default, and from an order refusing to vacate the judgment.

The facts are stated in the opinion of the court.

Jud. C. Brusie, Taylor & Holl, and *S. R. Hart,* for Appellant.

George B. Graham, and *Graham & Monson,* for Respondent.

MCFARLAND, J.—Judgment was given for plaintiff. Defendant appeals from the judgment; also from an order refusing a change of venue; also from an order refusing to set aside a default and vacate the judgment, because taken against him through surprise, excusable neglect, etc.

The motion for change of venue was on the ground that defendant resided in a county other than the one in which the action was commenced; and *perhaps* the denial of the mation may be sustained on the very technical ground that the notice and demand state that "defendant is a resident of" and "resides in" the other county, instead of stating, in the language of the code, that he so resided "at the commencement of the action."

It is possible, also, that on the record before us the ruling of the court denying the motion to open the default cannot be reached, although that denial seems to have been somewhat harsh, because while the defendant resided in Amador County, and his attorneys in Sacramento (the cause being pending in Fresno), the motion for change of venue and a demurrer to the complaint were denied and overruled on September 20th, in the absence of defendant and his attorneys; no leave to answer was given; default was entered the next day, and final judgment was entered on the 23d. It is not necessary, however, to thoroughly examine these questions, because, in our opinion, the judgment itself should be reversed for want of jurisdiction.

The action was commenced in the superior court of Fresno County. The complaint sets forth a written contract between plaintiff as vendor and defendant as vendee for the sale and purchase of certain lands situated in the county of Tulare, and avers facts showing plaintiff's right to enforce and foreclose a lien upon said lands for the purchase-money. The prayer of the complaint, as originally filed, did not ask, in terms, for a foreclosure of the lien, but a short time afterwards, and while an amendment could be made as a matter of right, the plaintiff amended the prayer of the complaint so as to make it ask expressly for a foreclosure of the lien, and the judgment forecloses said lien, and decrees the sale of said lands. The action, therefore, is an action to enforce a lien upon real property; and the constitution provides that "all actions for . . . . the enforcement of liens upon real estate shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions is situated." The superior court of Fresno had therefore no jurisdiction over the case, and no authority to enter the judgment. We do not just now recall any case where this point has been directly decided by this court, although in *Gurnee* v. *Superior*

Court, 58 Cal. 88, the law is clearly assumed to be as above stated; but we are fully satisfied, upon principle, that no court has jurisdiction to entertain an action like the one at bar unless it has been commenced in the county where the land is situated.

The judgment is reversed, with directions to the superior court to dismiss the action.

THORNTON, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied

[No. 12685. In Bank.—December 12, 1890.]

N. W. SPAULDING, RESPONDENT, *v.* NORTH SAN FRANCISCO HOMESTEAD AND RAILROAD ASSOCIATION, APPELLANT.

JURISDICTION — ADJUDICATION OF JURISDICTIONAL FACT — JUDICIAL ACTION OF SUPERVISORS—PETITION FOR GRADING OF STREET—MAJORITY OF FRONTAGE.—The rule that whenever the jurisdiction of a court not of record depends on a fact which the court is required to ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is conclusive, and not subject to any collateral attack, applies to the judicial action of a board of supervisors upon a petition for the grading of a street in deciding that a majority of the frontage of lots on the street where the work was proposed to be done was represented in the petition for the work.

ID.—ACTION FOR STREET ASSESSMENT IN SAN FRANCISCO—EVIDENCE.—In an action to recover an assessment for the grading of a street under the act of April 1, 1872, relating to street-work in San Francisco, which provides that no grading can be ordered by the supervisors unless a majority of the frontage of the lots shall be represented in the petition requesting the work, where the petition under which the grading was done did not show whether the petitioner owned a majority of the whole frontage or not, evidence that the petitioner was not the owner of more than one half of such frontage is inadmissible.

ID.—FAILURE TO REMONSTRATE—WAIVER OF OBJECTION TO GRADING—COLLATERAL ATTACK UPON DECISION OF SUPERVISORS.—An owner of land on such street who fails to file the remonstrance required by the act waives all objections to the form and granting of the petition, and the decision of the board in ordering the grading to be done is conclusive as against a collateral attack in an action to recover the assessment.

ID.—GRADING OF SEVERAL BLOCKS — PREVIOUS GRADING OF CROSS-STREETS.—The fact that the portion of the street sought to be improved had been divided into two separate parts by a cross-street, which had been previously graded, does not invalidate the assessment, as the whole of the street might have been graded, and the blocks divided by cross-streets included in one petition and assessment.

ID.—LETTING SECOND CONTRACT FOR INCREASED PRICE—PRESUMPTION OF REGULARITY.—Where the contract to grade the street was entered into for a certain sum per cubic yard, and afterwards, without any request of the contractor, another resolution of intention was published, resulting in a second contract with the same contractor, for a larger sum per cubic yard, and no reason appears for letting the second contract, it will be presumed that the board acted regularly in effecting the second contract, and that a valid and sufficient reason existed for its action, and an assessment against the owners is not thereby invalidated.

ID.—REMEDY FOR OBJECTION TO SECOND CONTRACT—APPEAL TO SUPERVISORS.—The remedy for any objection by a land-owner to the letting of a second contract for the grading of a street for an increased price, while a previous contract was in force, is by an appeal to the board of supervisors, under section 12 of the act of April 1, 1872, and not by defense to an action to recover the assessment under the second contract.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order denying a new trial.

The facts are stated in the opinions.

E. J. Pringle, and *D. H. Whittemore,* for Appellant.

W. H. H. Hart, and *J. M. Wood,* for Respondent.

MCFARLAND, J.—This is an appeal by defendant from a judgment enforcing a street assessment against a lot on Lombard Street.

The case was heard in Department, and the judgment was affirmed, and the facts of the case are stated in the opinion then rendered by Commissioner Gibson (filed July 8, 1890.) A hearing in Bank was ordered, because it was strenuously urged that the decision was in conflict with *Mulligan* v. *Smith,* 59 Cal. 206, and *Kahn* v. *Superviosrs,* 79 Cal. 388. But, after argument on rehearing, and mature consideration, we are satisfied with the conclusions reached in Department.

Mulligan v. *Smith* and *Kahn* v. *Supervisors* arose upon a special statute which did not provide for an adjudication of the jurisdictional fact that a majority of the frontage of lots fronting on the work proposed to be done was represented by the owners thereof in a petition for the work, and did not provide for a hearing to any of the owners of such frontage on that issue. But we think that section 4 of the act in question, in the case at bar (Stats. 1871–72, p. 805), does provide for such adjudication by and such hearing before the board of supervisors, and that the decision of the board that a majority of such frontage was represented in the petition was a decision which the act says "shall be final and conclusive." In Freeman on Judgments, section 523, it is stated as a rule (founded on numerous authorities there cited), that "whenever the jurisdiction of a court not of record depends *on a fact* which the court is required to ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is conclusive, and not subject to any collateral attack." The rule embraces "a large number of persons and tribunals not ordinarily spoken of as 'judges' nor as 'courts' "; for "their authority in this respect is judicial" (Freeman on Judgments, sec. 539); and it was expressly applied by this court to boards of supervisors in *People* v. *Hagar,* 52 Cal. 182. The rule stated in the latter case governs, we think, the case at bar. In *Turrill* v. *Grattan,* 52 Cal. 97, the only question which seems to have been raised was as to the sufficiency of the petition itself, which was a question, not of fact, but of law. In the case at bar, we think that the petition was sufficient. A diagram, which was not as full in details as it might have been, was presented with the petition; but it was not inconsistent with the main body of the petition, which sufficiently stated the facts required by the statute. The point that the contract was invalid because there had been a previous contract is sufficiently answered in the said opinion of

the commissioner; and we may add that the remedy for any such objection to the contract is provided for in section 12 of the act.

(It may be remarked, also, that it is doubtful whether the points which appellant seeks to make against the petition and to the rulings of the court are properly presented in the record.)

The judgment and order denying a new trial are affirmed.

PATERSON, J., FOX, J., SHARPSTEIN, J., and THORNTON, J., concurred.

The following is the opinion above referred to, which was rendered in Department Two July 8, 1890:—

GIBSON, C.—Defendant appeals from a judgment rendered in an action brought by plaintiff as the assignee of one J. S. Dyer, a street contractor, to recover an assessment for $323.91 for grading Lombard Street from Broderick Street to the west line of Lyon Street, in San Francisco, which had been levied upon a lot designated as No. 10 on the diagram attached to and made part of the assessment, and also from an order denying a new trial.

By section 4 of the act of April 1, 1872 (Stats. 1871–72, p. 804), pursuant to which the street was graded, it is provided that no work of the character mentioned can be ordered by the board of supervisors, "unless the majority of the frontage of the lots and land fronting on the work proposed to be done and described in said resolution, or which is to be made liable for such grading, except public property, shall have been represented by the owners thereof, or by their agents, in a petition to the said board of supervisors, stating that they are the owners and in possession, or agents, of the lots named in the petition, and also requesting that such improvement or street-work shall be done."

At the trial, after plaintiff had rested his case, defendant introduced the petition of F. Weisenborn, upon which the board of supervisors had ordered the grading, and upon which the contract therefor had been made with plaintiff's assignor, and then called the petitioner as a witness, and offered to prove by him that he was not the owner nor in the possession of more than one half of the land fronting on Lombard Street at the time he signed the petition and presented it to the board of supervisors. This offer the court ruled out, and the appellant claims that the court committed error in so doing.

The petition, on its face, shows that the petitioner is the owner of the entire frontage on each side of Lombard Street between Baker and Lyon streets, and 137½ feet on the latter street south from its junction with Lombard Street, and the same distance north on the same street from the junction of the last-mentioned streets; that there are six 50-vara lots fronting on Lombard street between Baker and Broderick streets, and that the crossing formed by Baker and Lombard streets had been graded. The frontage of petitioner on Lombard Street is not shown in feet, nor is it shown that one of the 50-vara lots is public property (a school lot), that should for that reason be excluded from the computation of frontage.

Now, while the failure to show these two facts makes the petition uncertain, on its face, as to whether the petitioner is the owner of a majority of the frontage to be affected or not, it does not make it appear that the petitioner is not the owner of more than one half of the frontage to be affected by the proposed improvement; for if it did, the petition would be fatally defective. The statement that he is the owner of two lots, being the entire frontage on both sides of one of the two blocks he seeks to have graded, and 137½ feet north and the same distance south on Lyon Street, from its junction with

Lombard Street, is not inconsistent with the fact that he is the owner of a majority of the whole frontage, but, on the contrary, is consistent with it. Hence the petition was sufficient for the board of supervisors to act upon, and ascertain whether it should be granted or not.

In exercising the jurisdiction thus obtained, and in granting the petition, the board of supervisors must necessarily have found that the petitioner was the owner of a majority of the frontage to be affected by the proposed improvement. Even if, as seemingly suggested by counsel for appellant, the act referred to does not provide, in express terms, for any determination of the matter of a petition, clearly, where a board is empowered to receive a petition, and is invested with discretion in regard to the subject-matter, it has the implied power to determine whether it shall be granted or not.

The law makes it the duty of the board, upon receiving a proper petition for the grading of a street, to publish a resolution of its intention to perform the work, and thereafter make an order that it shall be done. Can it be reasonably contended that if a petition sufficient upon its face should pray for the grading of a street already graded, the board would have to perform the idle ceremony of publishing a resolution of intention to perform the work and order the same to be done, regardless of the falsity of the apparent necessity of the grading shown by the petition? Assuredly not. To determine the necessity for the work requires the exercise of judgment on the part of the board, and in order to properly reach the consideration of this fact, it would first have to determine whether the petition were sufficient or not.

The amount of frontage owned or possessed by the petitioner being, then, one of the jurisdictional facts that the board had to pass upon, its determination of the same in favor of the petitioner is and was conclusive against the collateral attack of appellant at the trial. (*People* v. *Hagar*, 52 Cal. 171.) And by the terms of the

act itself it was intended to be conclusive, unless objected to in the manner provided for in section 4 of the act, which is as follows:—

"All owners of lands or lots, or portions of lots, who may feel aggrieved, or have objection to the ordering of the work described in said notice, ... shall file with the clerk of the board of supervisors a petition or remonstrance, wherein they shall set forth in what respect they feel aggrieved; . . . . which petition or remonstrance shall be passed upon by said board of supervisors, and their decision thereon shall be final and conclusive."

This provision is intended to enable parties in interest to reach any irregularity or defect in the petition itself, or matter connected with the granting of it, and to be their only remedy. There is no evidence here that appellant ever availed itself of the opportunity thus given to be heard. It therefore waived all objections to the form of and the granting of the petition.

In *Jennings* v. *Le Breton,* 80 Cal. 9, in applying a similar provision in section 12 of the same act, providing for an appeal to the board of supervisors respecting the acts of the superintendent of streets, it was held that an appeal to the board was the only remedy for any grievance caused by the official acts of the superintendent of streets, and that a failure to appeal was a waiver of all objections thereto. (See cases there cited.)

The statute under consideration provides for the publication of a notice of intention, in the form of a resolution, to make the proposed improvement, after receiving a sufficient petition therefor, and for a hearing upon the same at the instance of any person in interest who may feel himself aggrieved. This, we are convinced, presents a different case from that of *Mulligan* v. *Smith,* 59 Cal. 206; affirmed in *Kahn* v. *Board,* 79 Cal. 388. There it was held that the petition presented to the mayor of San Francisco for the opening of Montgomery

Avenue, in said city, under the special act of April 1, 1872 (Stats. 1871–72, p. 911), was invalid, and the mayor had no authority, under the act, to pass upon it; and that the approval by the county court of the report of the board of public works, based upon the petition, was of no effect, because the petition was insufficient, and the act did not provide for notice of a hearing to the parties in interest, in relation to it, at the time the report was to be considered, nor at any prior or other time.

The appellant also urges that as that portion of Lombard Street sought to be improved was divided into two separate portions by the crossing of Baker Street, which had previously been graded, the board of supervisors could not, under section 3 of the statute, order two separate and distinct portions of a street thus divided to be done as one piece of work. By that section, the board of supervisors are authorized to order the whole or any portion of a street graded. It is obvious that two blocks on a street may embrace the whole or only a portion of it; and we do not thing that because the Baker Street crossing had been previously graded, which it is conceded could be done separately, the two blocks divided by such work could not be included in one petition, resolution of intention, order, contract, and assessment.

Dyer, the assignor of plaintiff, entered into his first contract, based upon regular proceedings, to do the grading for fifty cents per cubic yard, but before the expiration of the time within which he was required to commence the work under this contract, pursuant to section 6, and within two days after the contract had been entered into, and without any request on the part of Dyer to be relieved from the contract, the board of supervisors passed and published another resolution of intention, which resulted in a second contract with the same Dyer, to perform the work at sixty cents per cubic yard, under which contract he performed the work.

On these facts the appellant bases his remaining ob-

jection, viz., that while the first contract remained in force, the board of supervisors had no power to let the second contract. Consequently, no recovery can be had for work performed under it. The reason why the board of supervisors saw fit to consider the first contract of no effect, and to let the second one, does not appear. It was treated by both the board of supervisors and Dyer as having been extinguished. Nothing was done under it. The contents of the first contract are not before us, and although assuming the proceedings which led up to it to have been regular, still, for some substantial defect or other in the contract itself, the board of supervisors may properly have deemed it necessary to renew the proceedings, and obtain bids over again, which resulted in another contract with the same person, who was a competitive bidder for the work. This being probable, we must presume that the board acted regularly in effecting the second contract, and that a valid and sufficient reason existed for such action. (Code Civ. Proc., sec. 1963, subd. 15.)

For these reasons, we think the judgment and order should be affirmed.

FOOTE, C., and VANCLIEF, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 12661. In Bank.—December 12, 1890.]

JOHN BENSON, RESPONDENT, *v.* J. M. SHOTWELL, APPELLANT.

VENDOR AND PURCHASER—CONTRACT OF SALE—RETURN OF DEPOSIT—OPTION OF PURCHASER—CONSTRUCTION OF CONTRACT.—A memorandum signed by a vendor, acknowledging the receipt of a certain sum of money as a deposit on account of the sale of certain land therein described, for a price fixed, and providing that the sale should be null and void and that the deposit should be returned in case the title did not prove satisfactory to the purchaser, is a valid contract for the purchase and sale of the land, and not a mere sale of an option to the purchaser to buy the land.

ID.—STATUTE OF FRAUDS—ACCEPTANCE OF PURCHASER.—The memorandum will bind the vendor if signed by him, though not signed by the purchaser, and the payment of the deposit by the purchaser is a sufficient acceptance by him of the terms of the contract.

ID.—LIEN OF PURCHASER FOR AMOUNT OF DEPOSIT.—The purchaser has a lien upon the property, for the amount of the deposit, in case of failure of the vendor to make good his part of the contract, unless the vendee is himself first in default.

ID.—ABSTRACT OF TITLE—MISNOMER OF GRANTOR—INSUFFICIENT TITLE OF RECORD.—Where the abstract of title showed that the title of record came into "H. P. Hepburn," and there was no deed from him, but the next deed of record was from "H. P. Hopkins," and the vendor claimed that the record was wrong, and that the deed purporting to be from Hopkins was in fact from Hepburn, but refused to submit his proof for examination of the purchaser or permit the deed to be recorded correctly, a good title is not shown, and the purchaser is justified in refusing to buy the land, and may claim return of the deposit, even though it may be afterward proved that the title was good.

ID.—SATISFACTORY TITLE—PRESCRIPTION.—Under an agreement for the purchase of land on condition that title would be satisfactory to the purchaser, the purchaser is entitled to a good paper title of record, which is sufficient in law, and is not bound to accept a title resting upon the statute of limitations, or to take the risk of determining, from facts *de hors* the record, whether or not an adverse claim is barred by limitation.

ID.—CONTRACT FOR POSSESSION — CONSTRUCTION — ACTUAL POSSESSION — ATTORNMENT OF TENANTS — INCOMPLETE POSSESSION.—Where the agreement for the sale of land provided that possession would be given and guaranteed to the purchaser, the purchaser is entitled to an actual *possessio pedis* of the whole land, and constructive possession by attornment of tenants is not sufficient; and where it appears that the tenants refused to give possession, and several of the houses were locked up and the occupants absent, and that an adverse right had grown up as to part of the land, the promise by several of the tenants to attorn to the purchaser does not constitute the delivery of possession required by the contract.

ID.—ASSIGNMENT OF PRIOR RENT — ENCUMBRANCES — TENANCY.—The fact that the contract of sale provided that the purchaser should be entitled to rent from a day anterior to the date of the contract does not bind the purchaser to take the lot subject to encumbrances, or to the right of possession of tenants at the time of final completion of the terms of the agreement, nor modify a provision in the contract for delivery of possession.

ID.—CONCURRENT CONDITIONS.—Where by the terms of the contract the delivery of possession and transfer of title by the vendor, and payment of purchase-money by the purchaser, were to be simultaneous and concurrent, the conditions are mutual and dependent, and the vendor is not entitled to demand the purchase-money until delivery of possession.

ID.—QUIETING TITLE—ACTION BY VENDOR—RETURN OF DEPOSIT—RIGHTS OF PURCHASER.—Where the purchaser of land pays a deposit on account of the sale, under an agreement with the vendor, by which he was to have the deposit returned to him if the title should not be satisfactory, and it appears that the purchaser is entitled to a return of the deposit, the vendor cannot have his title quieted against the purchaser until he first restores the money received.

ACTION TO QUIET TITLE—EQUITY—MAXIM.—An action to quiet title is in the nature of a suit in equity, and relief therein is subject to the maxim that he who asks equity must do equity.

ID.—RESCISSION OF CONTRACT—RESTORATION OF MONEY RECEIVED.—Where the plaintiff in an action to quiet title, if he had brought an action to rescind a contract with the defendant would not have been entitled to that relief until he had restored all that he had received under the contract, he cannot avoid this obligation by coming into equity to quiet his title.

APPEAL — FINDINGS — SUPPORT OF JUDGMENT — MODIFICATION—REVERSAL.—Upon appeal, where the findings as they stand would not support a judgment for the appellant, and the appellant is entitled to a reversal of the judgment, the judgment cannot be modified, in the appellate court, so as to give the appellant the relief to which he is entitled, as the appellate court cannot make findings for the court below, but can only reverse the judgment.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order denying a new trial.

The facts are stated in the opinion of the court.

A. N. Drown, for Appellant.

The transaction was a sale. (Civ. Code, sec. 1726, subd. 3, and sec. 1729.) The contract is valid, sufficient, and complete. It did not require the vendee's signature. (*Fabian* v. *Callahan,* 56 Cal. 159; *Worrall* v. *Munn,* 5 N. Y.

229; 55 Am. Dec. 330; Civ. Code, sec. 1741; Code Civ. Proc., sec. 1971.) A deposit is considered as payment, in part, of the purchase-money. (Sugden on Vendors, 8th Am. ed., p. 50, sec. 19.) The appellant has a lien upon the land for the portion of the purchase price which he paid. (Civ. Code, sec. 3050; *Chase* v. *Peck,* 21 N. Y. 585; Overton on Liens, sec. 640, p. 694; Pomeroy's Eq. Jur., secs. 167, 1263.) As the vendor could give neihter title nor possession, the appellant was entitled, at least, to recover the money paid. (*Sanders* v. *Lansing,* 70 Cal. 429.) The delivery of possession and the transfer of title were to be simultaneous and concurrent with the payment of the purchase-money. The conditions of the contract were mutual and dependent,—"concurrent,"—within the meaning of section 1437 of the Civil Code; and the vendor's giving possession was a condition precedent to the vendor's right to insist upon a payment of purchase-money. (Civ. Code, sec. 1439; *Hill* v. *Grigsmy,* 35 Cal. 661–663; *Stockton Savings & L. Soc.* v. *Hildreth,* 53 Cal. 723; Pomeroy on Specific Performance, sec. 336; *Powell* v. *Dayton S. & G. R. Co.,* 14 Or. 356.) In contracts of this nature, time is deemed to be of the essence of the agreement. (Sugden on Vendors, 8th Am. ed., 257–259.) Failure to put appellant in possession constituted a breach of the agreement, on the part of respondent. (*Bigler* v. *Morgan,* 77 N. Y. 315, 318; *Morange* v. *Morris,* 3 Keyes, 48; *Pryse* v. *McGuire,* 81 Ky. 606; *Egbert* v. *Chew,* 14 N. J. L. 446; 2 Sutherland on Damages, 210, 211, note.) If unable to give the whole amount of land, the law holds the vendor as utterly failing. (Pomeroy on Specific Performance, secs. 339, 366.) The stipulation as to possession would not have been satisfied by a mere attornment of the tenants, as attornment followed by operation of law. (Civ. Code, sec. 1111; Taylor on Landlord and Tenant, 7th ed., secs. 440, 442, 621.) As there was objection to the title, the purchaser could not have taken possession, as such act would

be deemed an acceptance of such title. (Sugden on Vendors, 8th Am. ed., p. 7, par. 16, p. 343, par. 14; p. 630, par. 9.) The purchaser will not be forced to complete the contract unless the title is free from any reasonable doubt. (Pomeroy on Specific Performance, secs. 198, 199, 342, 347, note 1; Boone on Real Property, sec. 383.) The doubt may relate to the construction of deeds and other writings, which constitute the chain of title. (Pomeroy on Specific Performance, secs. 200, 203.) The vendee is entitled to have a paper title sufficient in law, and is not bound to accept a title resting on adverse possession. (*Hartley* v. *James,* 50 N. Y. 42.) If the seller affers a defective title, a formal tender and offer of payment and demand of a deed is not necessary to enable the purchaser to recover back what he has paid. (*Hartley* v. *James,* 50 N. Y. 43.) The purchaser is entitled to have a title which is clear and good on the record. (Pomeroy on Specific Performance, sec. 251, note 3; *Turner* v. *McDonald,* 76 Cal. 177; 9 Am. St. Rep. 189.) This action is purely equitable in its nature, and brings appellant under the rule that he who seeks equity must do equity. (*Brandt* v. *Wheaton,* 52 Cal. 430; *Hancock* v. *Plummer,* 66 Cal. 338; *Polack* v. *Gurnee,* 66 Cal. 267, 269; *Ballard* v. *Carr,* 48 Cal. 75; *Guttenberger* v. *Woods,* 51 Cal. 523.) Respondent's proper suit was to foreclose the right of appellant to purchase. And in such a suit the court would have been both obliged and able to adequately protect the vendee by its decree. (*Keller* v. *Lewis,* 53 Cal. 113.) If he had sought to rescind the contract of sale for the non-payment of the purchase-money, he could not have done so without restoring, or offering to restore, everything of value which he has received from appellant under the contract. (*Wilson* v. *Sturgis,* 71 Cal. 229; *Booth* v. *Hoskins,* 75 Cal. 276; Civ. Code, sec. 1691, subd. 2; *Gifford* v. *Carvill,* 29 Cal. 593; *Parks* v. *Evansville, I. & C. S. L. R. R.,* 23 Ind. 571; *Chandler* v. *Chandler,* 55 Cal. 269; *Cazara* v. *Orena,* 80 Cal. 132.)

Edward J. Pringle, for Respondent.

The stipulation that title should be satisfactory does not give to a vendee a license to reject the title from caprice or temper, or as a "mere pretext to get rid of the bargain." (1 Dart on Vendors and Purchasers, 145; *Beardslee* v. *Underhill,* 37 N. J. L. 310; *Lord* v. *Stebbens,* 1 Younge & C. 222–227; *Folliard* v. *Wallace,* 2 John. 402; *Kirkland* v. *Little,* 41 Tex. 456.)

Fox, J.—Action in form *quia timet,* or one brought under section 738 of the Code of Civil Procedure, for the purpose of determining the adverse claim of defendant to beach and water lot No. 717, San Francisco. Defendant denies that he asserts any claim to the lot, other than that which he derives under a certain contract with the plaintiff for the purchase thereof; alleges payment of one thousand dollars under said contract, with offer to fully perform on his own part, but inability and refusal to perform on the part of plaintiff; and in addition files a cross-complaint against plaintiff, demanding a return of said one thousand dollars, with interest, together with damages for non-performance on the part of plaintiff, and other relief. Findings and judgment for plaintiff; motion for new trial denied, and defendant appeals.

Respondent claims that the transaction between himself and appellant was not a sale, or contract for the sale, of the lot, but a mere sale of an option to buy the lot; that the one thousand dollars was paid for the option, and that defendant not having exercised the option, and made the purchase, the transaction is finally closed, and he, plaintiff, is entitled to have his title quieted, and to retain the one thousand dollars. Defendant on the other hand, insists that the transaction was a sale. The contract was in the words and figures following:—

"SAN FRANCISCO, September 7, 1883.

"Received from J. M. Shotwell one thousand dollars, being deposit on account of sale by me to him of beach

and water lot No. 717 [describing it], for the sum of sixteen thousand dollars ($16,000). Purchaser to pay the commission of two hundred dollars ($200) for selling, to Messrs. Moxley and Fisher. Purchaser to pay for paving crossing of Howard and Steuart streets, now being done, at an amount not exceeding one hundred and twenty dollars ($120). The seller to pay all other street-work now being contracted for or already done. Purchaser to pay taxes for current year 1883–84. Purchaser to have the rent of lot from and after September 1st. Possession of lot given and guaranteed to purchaser on transfer of title. Fifteen days given to purchaser for examination of title and making of deed. If title not satisfactory to purchaser, sale to be null and void, and above deposit returned to him.

"(Signed) JOHN BENSON.

"Witness: CHARLES C. FISHER."

The thousand dollars was paid simultaneously with the execution, delivery, and date of this paper. The fifteen days consequently expired on the 22d of September.

There is no question in our minds that this was a good and valid contract for the purchase and sale of the lot, the deposit to be returned in case the title did not prove satisfactory, or of inability on the part of the seller to comply with its terms. It comes fairly within the provisions of sections 1726 and 1729 of the Civil Code. It was signed by the party to be charged, and by the only party who was required to sign it. (Civ. Code, sec. 1741; *Fabian* v. *Callahan,* 56 Cal. 159.) The payment of the deposit by the other party was a sufficient acceptance of its terms, and by the express terms of the paper that payment was not, as claimed by respondent, for an option, but "a deposit on account of sale." For the amount of that deposit, the vendee had and has a lien upon the property, in case of failure on the part of the vendor to make good his part of the contract, unless the vendee is

himself first in default. (Civ. Code, sec. 3050; Pomeroy's Eq. Jur., secs. 167, 1263, and cases there cited.)

At or about the time of making the contract, respondent delivered to appellant an abstract of title, which appellant had revised and continued down to date at his own expense, and then placed it in the hands of a well-known examiner. On the 17th of September he received the report of his examiner, and immediately notified the respondent, in writing, of certain defects in the record title, calling his attention thereto, and as to one which seemed to be an important one, suggesting that possibly it arose from clerical error in the record, and asking for the original papers, that he might submit them to his counsel and examiner; also calling his attention to certain facts in regard to the occupancy and possession of the lot, and to the fact that "to avoid trouble and give undisputed possession, it will be necessary to oust them all." Receiving no response to this, appellant again wrote to the respondent, on the 19th, as follows: "I am waiting patiently your reply to my note of the 17th inst., referring to matters requiring your attention in clearing up title, etc., to water lot No. 717. If you will be kind enough to inform me where I can find you during business hours, and at what time, I will meet you. I wish to close up the business without further delay." After receiving this letter, respondent called, and claimed that he had the original of the deed to which exception was taken in the chain of title shown by the abstract, which, according to the record, was signed "Hopkins," but which he claimed was in fact signed "Hepburn," as it was required to be, in order to make the title correct; but he refused to let the appellant take it, to submit it to counsel, or to put it upon record. His attention was then also particularly called to the condition of the lot as to the matter of possession, but he took no measures to prepare himself for delivery of possession, as required by his contract. On the 22d of September, the day when

by the terms of the contract the transaction was to be closed, he sent his agent with his deed of the premises, and made a tender thereof, and demanded the remaining fifteen thousand dollars. Appellant counted out to him the money, and as he was about to put it in a bag and carry it away, appellant said: "Wait a minute, gentlemen, you must go down and put me in possession of the lot, and then you can take the money away," and added that upon receiving possession of the whole lot, and with the correction of the deeds, he was ready to complete the purchase.

The evidence given upon the trial shows the title from two sources: 1. An alcalde grant made January 3, 1850; 2. A deed from the California land commissioners dated August 26, 1854. In tracing the title down from the alcalde grant, it came into H. P. Hepburn. There, according to the records of the recorder's office, and as shown by the abstact, there was a complete break in the chain of title. The next deed in order of date was from H. P. Hopkins, and there was no deed of any date from H. P. Hepburn. It was admitted upon the trial, and so appears in the record, that the land is within the grant to the pueblo of San Francisco. If that is true, and it must be taken as true for the purposes of this case, here was a fatal defect in the record title. It could not be helped out by a good chain of deeds from the land commissioners down; for if the land was within the grant to the pueblo, the commissioners had no title to grant, and nothing was acquired or taken under their deed. It therefore became important that the connection should be complete with the alcalde title. According to the record, the plaintiff utterly failed to connect himself with that title. Under the contract, defendant was entitled to a good paper title, sufficient in law, and was not bound to accept a title resting upon the statute of limitations, or take the risk of determining, from facts which he might learn *de hors* the record, whether or not

the statute of limitations could be successfully pleaded against an adverse claim. (*Hartley* v. *James,* 50 N. Y. 42.) True, plaintiff claimed, and upon the trial proved, that the record was wrong, and that the deed purporting to be from Hopkins was in fact from Hepburn. But at the time when it was his duty to show good title, he allowed the matter to rest upon his naked assertion, and refused to submit his proof for examination, or to permit the deed to be recorded correctly. Defendant had a right, therefore, to stand by the record, and to govern his conduct accordingly.

Some other discrepancies in the chain of this title were also pointed out as defects, at the time, but they do not seem to have been seriously insisted upon, and comparatively, at least, they were immaterial.

As to possession, the evidence shows that there were on the lot several tenements, a blacksmith-shop, a shoemaker's shop, a stable, and several shanties, ships' cabins, and the like; that one or two of these tenements were occupied by persons attorning to the plaintiff, and paying a small monthly rental; that others of them were occupied by persons whose names even could not be learned,—persons sleeping there at night, and absent during the day,—the regular tenant claiming that they slept there by his permission, but he did not even know the names of some of them. Along the rear end of the lot, certain buildings, supposed to stand on the corners, and a fence running from one to the other of them, constituted the rear line of occupancy, but it was found, upon survey, that these buildings and this fence were inside the line of the lot one foot eight and a half inches, and that for at least twelve or thirteen years this strip had been so fenced *out* of this lot, and used and occupied by the tenants on the adjoining lot, which belonged to Mrs. Klumpke, then in Europe, with no agent here authorized to act for her in the matter of determining or deciding whether she claimed it or not. These

facts appear from the evidence, without substantial, and it seems to us without any, conflict.

Under these circumstances, the defendant claimed and demanded that when he paid his money he should be given, not only a good paper title, but the actual possession of the lot, and of the whole lot. When demand was made, and the money counted out, plaintiff's agent sent some persons down with defendant to put him into possession, but the tenants said they could not give it; several of the small tenements were locked up, and the occupants absent, and the strip on the outside of the fence was completely covered, to a depth of several feet, with lumber belonging to the tenant of Mrs. Klumpke. The parties returned without a surrender of possession.

It is claimed, on the part of respondent, that the tenants who were under lease from plaintiff said while there that they would acknowledge the defendant as their landlord, and attorn to him, and that this was all that was required. But this was not the measure of plaintiff's obligation, according to the letter of his bond. According to that paper, defendant was entitled to an actual *possessio pedis* of the whole lot. The language of the contract implied nothing less. Constructive possession, and the duty to attorn, would follow the title; and if that was all that was meant, there was no need to have said anything about possession in the contract. But in that instrument it is expressly provided that the possession of the lot is to be both "given and guaranteed to purchaser on transfer of title." Nor is this relieved or modified by the other provision, that he is to receive the rent from and after September 1st. That assures him, in case the contract is carried out, the rent from a day anterior to the date of the contract, but does not bind him to take the lot with all its encumbrances at the time of final completion of the terms of the agreement. Besides, this proposed attornment was from only two or three of the many occupants of that lot. The others knew no land-

lord, and were unknown to any. Their tenements were locked up, and access to them could not be had without a violation of law. Still more, as to an important portion of the lot it was certain that an adverse right had grown up, which, if asserted, would defeat the title as to that portion, and it was not known then, or even at the time of this trial, whether it would be asserted or not.

By the terms of the contract, delivery of possession and the transfer of title were to be simultaneous, and both were to be concurrent with the payment of the money. The conditions of the contract were mutual and dependent, concurrent, within the meaning of section 1437 of the Civil Code. Under it, respondent was not entitled to demand payment of the money until he delivered that possession. (Civ. Code, sec. 1439; *Hill* v. *Grigsby,* 35 Cal. 661–663; *Stockton Sav. etc. Soc.* v. *Hildreth,* 53 Cal. 723.) The word "possession," as used in this contract, is to be understood and construed in its ordinary and popular sense. (Civ. Code, sec. 1644.) According to the uncontradicted evidence, appellant offered to perform according to the strict letter of the contract. (Civ. Code, secs. 1437, 1498.) And no objection was made to the mode of such offer. (Civ. Code, sec. 1501.) Nothing which transpired afterwards met the measure of his rightful demand. The subsequent written surrender of possession to plaintiff by his tenants, which was afterwards shown to defendant, did not meet the calls of the contract. It was a mere statement of surrender, not accompanied or followed by an actual surrender, and, as before stated, was from only a portion of the actual occupants.

The court found in favor of plaintiff, and against defendant, on all these questions of performance and offers to perform on the part of the respective parties. Without specifying them separately, we think the findings upon these questions are clearly against the evidence, and that the evidence on the subject is without substan-

tial conflict. The case must therefore go back for a new trial, and it remains only to consider the points made on the questions of remedy and relief.

Appellant, although not appearing to be in default, has not asked for specific performance. Respondent has not chosen to bring his action to rescind, but rather seeks to quiet title. If he had sought to rescind, appellant not being in default, respondent would not have been entitled to that relief until he had restored all that he had received under the contract. (Civ. Code, sec. 1691; *Wilson* v. *Sturgis,* 71 Cal. 221, and cases there cited; *Booth* v. *Hoskins,* 75 Cal. 276; *Cazara* v. *Orena,* 80 Cal. 132.) He cannot avoid this obligation by coming into equity to quiet his title. The complaint in this case must be treated as a bill in equity. (*Brandt* v. *Wheaton,* 52 Cal. 430; *Hancock* v. *Plummer,* 66 Cal. 338.) This action has always been held to be on the equity side of the court. (*Polack* v. *Gurnee,* 66 Cal. 267–269.) He who asks equity must do equity. (*Ballard* v. *Carr,* 48 Cal. 75; *Guttenberger* v. *Woods,* 51 Cal. 523.) Under this contract and this evidence, plaintiff cannot come into a court of equity, and ask to quiet his title against the claim of defendant, without restoring the money he has received. (*Chandler* v. *Chandler,* 55 Cal. 269.) The real subject of controversy here is the contract of sale, and the rights of defendant thereunder. The judgment must necessarily adjudicate those rights, and will pass only incidentally upon plaintiff's title. (*Parnell* v. *Hahn,* 61 Cal. 131.) It may be that respondent can make good title, but he did not at the time show good record title; was unable to put his vendee in possession, and has never yet shown that his title, even if good paper title, has not been defeated as to a part of the lot by adverse possession. Under such circumstances, the appellant was entitled to recover the money paid. (*Sanders* v. *Lansing,* 70 Cal. 429.)

It is suggested that we can order a modification of the

judgment, requiring plaintiff to repay to defendant the sum of one thousand dollars, with interest thereon from September 22, 1883, and that thereupon plaintiff's title be quieted. On the evidence, such a judgment would seem to be equitable between the parties, but it would not be supported by the findings as they now stand, and this court cannot make findings for the court below. If in the court below the parties shall consent to so adjust their differences, no doubt the court will facilitate them in so doing. All that we can do is to order that the judgment and order appealed from be reversed, and it is so ordered.

PATERSON, J., MCFARLAND, J., SHARPSTEIN, J., and THORNTON, J., concurred.

WORKS, J., concurring.—I concur in the judgment, on the ground that possession was not given as provided in the contract. I do not concur in the conclusion reached, that a good title was not shown. The respondent showed, by producing his deed, that the record was incorrect, and that the deed was made by the proper party. This was done on the day the contract was to be consummated, and was sufficient. Besides, it was satisfactory to the appellant, as he only required, as a condition upon which he was willing to pay the purchase-money, that possession of the property be given him.

Rehearing denied.

[No. 12779. In Bank.—December 12, 1890.]

MOSES MITCHELL, RESPONDENT, *v.* SOUTHERN PACIFIC RAILROAD COMPANY, APPELLANT.

NEGLIGENCE—RAILWAY ACCIDENT—BURDEN OF PROOF.—In an action against a railroad company to recover damages for injuries sustained by a passenger, caused by a train running off the track owing to the negligence of the railroad company, although the burden of proof is upon the plaintiff to establish negligence, yet where the injury is admitted, and the derailment and overturning of the car are undisputed facts, and there is evidence tending to show that at the time of the accident the train was running down a steep incline leading to the bed of a river, on a new and curved track, at an unusual and dangerous speed, the burden of proving that the injury was not caused by its want of care is on the railroad company.

ID.—CONTRIBUTORY NEGLIGENCE—PASSENGER INJURED FROM PLATFORM—VIOLATION OF RULES—CONSTRUCTION OF CODE.—Section 484 of the Civil Code, protecting a railroad company from damages for an injury to a passenger received on or from the platform of a car, in violation of printed regulations posted in the car, or of verbal instructions to the passenger, is intended to prevent the imprudent act of standing or riding on the platform, and neither the statute nor the regulation has any application where a passenger is justifiably entering or leaving the cars when injured.

ID.—ATTEMPT TO ESCAPE FROM PLATFORM—QUESTION OF FACT.—Where, at the time the accident occurred, the plaintiff was standing on the platform of the car, and his testimony showed that he had gone there immediately before the accident, in fear that some disaster would occur because of the speed of the train, and that he intended to jump therefrom to the sand, but that the car was overturned as soon as he reached the platform, it is a question for the jury whether the attempt thus made was an unreasonable or rash act, or was one which a person of ordinary care and prudence might do under the circumstances.

ID.—PRUDENCE OF PLAINTIFF—SAFETY OF PASSENGERS—RESULT OF ATTEMPT TO ESCAPE.—The facts, that a passenger on a railroad train was injured in an attempt to escape from an expected accident, and that those who remained in the car escaped without injury, are circumstances to be considered by the jury in determining whether the injured party acted as a man of ordinary prudence; but where he has acted with reasonable prudence, upon the probabilities of an effort to escape, it cannot be said that the attempt to escape constituted contributory negligence, nor does the inquiry depend upon the result of the attempt to escape.

ID.—EVIDENCE — ACTION OF OTHER PASSENGERS — ERROR WITHOUT PREJUDICE.—In such a case, it is error to exclude evidence of the actions of other passengers, who remained in the car, and as to whether or not any of them were injured. Such evidence is competent as a part of the *res gestæ*, to show what they demand prudent conduct. But such error is cured

by the admission of undisputed evidence showing that there were only a few passengers in the car besides the plaintiff, and that they all remained in their seats until the car was overturned, and all escaped unhurt.

ID.—ERROR IN EXECUTING EVIDENCE — VIOLATION OF RULES BY PLAINTIFF—CORROBORATION OF CONDUCTOR—CONFLICTING EVIDENCE.—In such an action, where the conductor testified that he left the car two or three minutes before the accident occurred, and that the plaintiff went out with him, and that after giving orders to let off the brakes, he went back into the car and sat down, while the plaintiff remained standing on the platform, in violation of the rules, and such evidence is in conflict with the testimony of the plaintiff, it is error to exclude a question asked one of the passengers, by the defendant's counsel, in corroboration of the conductor, as to whether the conductor returned into the car after he and the plaintiff left it, and before the accident occurred.

APPEAL from a judgment of the Superior Court of Monterey County, and from an order denying a new trial.

The following instructions were given by the superior court upon the subject of the burden of proof, and of the right of plaintiff to be upon the platform of the railroad car: "The court instructs you that the burden of proving negligence rests on the party alleging it; and where a person charges negligence on the part of another as a cause of action, he must prove the negligence by a preponderance of evidence. In this case, the plaintiff claims he was injured through the negligence of defendant's employees. So that if you find, from the evidence, that the weight of evidence is in favor of the defendant, or that it is equally balanced, the plaintiff cannot recover, and your verdict must be for the defendant. The plaintiff can recover in this action only upon proof of defendant's negligence; but in order to prove that negligence, it is not necessary for the plaintiff, if he was injured by the overturning of the car in which he was riding, to prove how or why that overturning occurred. It being admitted, as already stated, that the plaintiff was a passenger on the train of the defendant, and that he had paid, and the defendant had accepted, his fare,

all that the plaintiff need establish in the first instance, in order to enable him to recover in this action, is, that the car in which he was riding was overturned without his fault, and that by reason thereof he suffered the injuries complained of. When the plaintiff has done this he may rest, and is at that point entitled to your verdict; for the presumption is, that the overturning of the car occurred through the negligence of the defendant, and the burden of proving that there has been no negligence is cast upon the defendant. How or why the overturning occurred, it is no part of the plaintiff's case to show; the fact that the car did so overturn is all that he need establish, in order to recover for such injuries as he may have sustained, unless his want of ordinary care contributed to such overturning, or to his injury. In order to rebut this presumption of negligence, the defendant must show that the overturning was the result of inevitable casualty, or of some cause which human care and foresight could not prevent; for the law holds it respon sible for the slightest negligence, and will not hold it blameless except upon the most satisfactory proofs. In doing this, the defendant must necessarily explain how the overturning occurred, and if it fails to do this, the presumption of negligence remains. The court further instructs you that if you find, from the evidence, that at the time plaintiff left his seat in the smoking-car there was no imminent peril of life or limb, and no apparent danger, but that such imminent peril of life or limb, or apparent danger, arose after plaintiff took his position on the platform of the smoking-car, then plaintiff cannot recover, and your verdict must be for the defendant. The court further instructs you that if you find, from the evidence, that the plaintiff left his seat in the smoking-car and went to the platform of said car, and stood there awhile, then jumped off, he, plaintiff, did so at his own risk, and the defendant cannot be held responsible for any injuries he, plaintiff, may have received, even if

the person in charge of the train saw him and did not tell him to go inside of the car. The failure of the person in charge of the train to direct or command him to go inside is not such negligence as will render the defendant liable. The person in charge of the train was under no legal obligation to notify him that such a place was not the proper place for him to be. If you believe that the plaintiff went upon the platform under a reasonable apprehension of a derailment of the train, and for the purpose of jumping off in case of an accident, and while there for that purpose was injured by the overturning of the car, I instruct you that his being on the platform under these circumstances was not riding or standing on the platform within the meaning of the rule which prohibits such riding or standing. Though you should believe, from the evidence, that had the plaintiff remained inside of the car he would not have been injured, this does not, in itself, bar a recovery by him in this action, though it turned out, in the end, that the platform was a more dangerous place than the inside of the car; yet if the danger of overturning was imminent, and the plaintiff, acting upon the instinct of self-preservation, placed himself in the position which appeared to him, as a reasonable man, to be most safe, and made such choice as a person of ordinary prudence and care placed in the same situation might have made, this does not constitute negligence on the part of the plaintiff. The peril of remaining in the car or going upon the platform is to be judged by the circumstances as they then appeared, and not by the result. The fact that passengers inside of the car were not injured does not prove that the plaintiff was imprudent or negligent in going upon the platform; he was compelled to choose the hazard which appeared to him to be the least; that is, to act upon the probabilities as they appeared at the time." The jury returned a verdict in favor of the

plaintiff for eleven thousand dollars damages. Further facts are stated in the opinion of the court.

S. F. Geil, and *H. V. Morehouse,* for Appellant.

The mere fact that an injury is suffered by a passenger while on his journey is not sufficient to raise a presumption of negligence on the part of the carrier. (Shearman and Redfield on Negligence, secs. 5, 80; McFarland, J., in *Treadwell* v. *Whittier,* 80 Cal. 604; 13 Am. St. Rep. 175.) A carrier only undertakes that he will carry a passenger without negligence or fault, and he is not liable if injuries happen from sheer accident or misfortune, where there is no negligence or fault, or where no want of caution, forethought, or judgment would prevent the injury. (Cooley on Torts, 2d ed., 768, 769.) The burden of proof is upon the plaintiff to establish negligence upon the part of the defendant. (Code Civ. Proc., sec. 1981; Shearman and Redfield on Negligence, secs. 12, 280; *Illinois etc. R. R. Co.* v. *Cragin,* 71 Ill. 177; *Heinemann* v. *Heard,* 62 N. Y. 448.) And fault and negligence are not presumed. (Deering on Negligence, sec. 405.) The accident was an "inevitable casualty," or that "which human foresight or care could not prevent," and for which defendant is not liable in damages. (Shearman and Redfield on Negligence, sec. 5, and authorities cited; 2 Thompson on Negligence, sec. 1234; Deering on Negligence, sec. 4.) The speed with which a train is run is not negligence *per se.* (Shearman and Redfield on Negligence, sec. 478; Deering on Negligence, sec. 241; *Indiana etc. R. R. Co.* v. *Hall,* 12 Am. & Eng. R. R. Cas. 146.) The law does not allow plaintiff the benefit of running out on the platform, unless he acts upon a well-grounded fear,—a fear which would excite a reasonable man. (*South Covington R. R. Co.* v. *Ware,* 27 Am. & Eng. R. R. Cas. 206; *Reary* v. *Louisville etc. R. R. Co.,* 34 Am. & Eng. R. R. Cas. 277; *Chicago etc. R. R. Co.* v. *Felton,* 33 Am. & Eng. R. R. Cas. 533; *Gulf etc. R. R. Co.* v. *Wallen,* 65 Tex. 568.) And if plaintiff, without

reasonable cause, placed himself outside of the car, on the platform, he assumed the hazards of so doing. (*Coleman* v. *Second Avenue R. R. Co.,* 114 N. Y. 609; *Clark* v. Eighth Avenue R. R. Co., 36 N. Y. 135; 93 Am. Dec. 495; *Dixon* v. *Brooklyn City etc. R. R. Co.,* 100 N. Y. 171.) A regulation forbidding passengers to stand on the platform of a car while the train is in motion being reasonable and proper, a passenger who is injured while standing on the platform, in violation of such regulation, is guilty of contributory negligence, and cannot maintain an action to recover damages for such injuries. (*Alabama etc. R. R. Co.* v. *Hawk,* 72 Ala. 112; 47 Am. Rep. 403; *Solomon* v. *Manhattan R. R. Co.,* 103 N. Y. 437; 57 Am. Rep. 760; *Graville* v. *Manhattan R. R. Co.,* 105 N. Y. 525; 59 Am. Rep. 516; *Rockford etc. R. R. Co.* v. *Coultas,* 67 Ill. 398; *Camden etc. R. R. Co.* v. *Hoosey,* 6 Am. & Eng. R. R. Cas. 454; *Fleck* v. *Union R. R. Co.,* 10 Am. & Eng. R. R. Cas. 172.) The question asked by defendant as to the conduct of the passengers who remained in the car, and whether any of them were injured, was competent as part of the *res gestæ,* and also as evidence of what was deemed prudent by those in the same situation, having an interest to take the least and avoid the greatest hazard. (*Twomley* v. *C. P. N. & E. R. R. Co.,* 69 N. Y. 158; 25 Am. Rep. 162.)

D. M. Delmas, for Respondent.

The proof by a passenger of the derailment or overturning of the vehicle in which he is being carried, and resulting injury, establishes a *prima facie* case of negligence. (*Breen* v. *N. Y. Cent. R. R. Co.,* 109 N. Y. 297; 4 Am. St. Rep. 450; *Holbrook* v. *Utica,* 12 N. Y. 236, 242, 243; 64 Am. Dec. 502; *Fairchild* v. *Cal. Stage Co.,* 13 Cal. 599, 605; *Boyce* v. *Cal. Stage Co.,* 25 Cal. 460, 468, 469; *Lawrence* v. *Green,* 70 Cal. 417, 419–421; 59 Am. Rep. 428; *Treadwell* v. *Whittier,* 80 Cal. 574, 582, 583, 587; 13 Am. St. 175; *Christie* v. *Griggs,* 2 Camp. 79; *Carpue* v.

London etc. R'y Co., 5 Ad. & E., N. S., 747; *Dawson* v. *Manchester*, 5 L. T., N. S., 682; *Edgerton* v. *N. Y. etc. R. R. Co.*, 39 N. Y. 227, 229, 230; *Peoria etc. R. R. Co.* v. *Reynolds*, 88 Ill. 418–420; *Wilson* v. *Northern Pac. R. R. Co.*, 26 Minn. 278, 280; *Eureka* v. *Timmons*, 51 Ark. 460; *Pittsburg etc. R'y Co.* v. *Thompson*, 56 Ill. 138, 141; *Edgerton* v. *N. Y. etc. R. R. Co.*, 35 Barb. 389, 394, 395; *Pittsburg etc. R. R. Co.* v. *Williams*, 74 Ind. 462, 464–466; *George* v. *St. Louis etc. R'y Co.*, 34 Ark. 613, 624; *Sullivan* v. *Philadelphia R. R. Co.*, 30 Pa. St. 234, 239, 240; 72 Am. Dec. 698; *Yonge* v. *Kinney*, 28 Ga. 111, 113; *Brignoli* v. *Chicago etc. R'y Co.*, 4 Daly, 182–184; *Denver etc. R. R. Co. v. Woodward*, 4 Col. 1, 9, 10; *Louisville etc. R. R. Co.* v. *Ritter*, 85 Ky. 368; *Louisville etc. R. R. Co.* v. *Smith*, 2 Duvall, 556–558; *Seybolt* v. *N. Y. etc. R. R. Co.*, 95 N. Y. 562, 568, 569; 47 Am. Rep. 75; *Cleveland etc. R. R. Co.* v. *Newell*, 104 Ind. 264, and cases cited; 54 Am. Rep. 312; *Hipsley* v. *Kansas City R. R. Co.*, 88 Mo. 348; *Central R. R. Co.* v. *Sanders*, 73 Ga. 513; *Moore* v. *Parker*, 91 N. C. 275; *Murphy* v. *Coney Island etc. R. R. Co.*, 36 Hun, 199; *Texas* R. R. *Co.* v. *Suggs*, 62 Tex. 323; *Meier* v. *Pennsylvania R. R. Co.*, 64 Pa. St. 225, 230; 3 Am. Rep. 581; *Baltimore R. R. Co.* v. *Worthington*, 21 Md. 275, 282, 283; 83 Am. Dec. 578; *Stokes* v. *Saltonstall*, 13 Pet. 181, 190, 191, 193; *Brehm* v. *Great Western R. R. Co.*, 34 Barb. 256, 266, 271; *Railroad Co.* v. *Pollard*, 22 Wal. 341; *Sanderson* v. *Frazier*, 8 Col. 79; 54 Am. Rep. 544; *Laing* v. *Colder*, 8 Pa. St. 479, 482, 483; 49 Am. Dec. 533; *Galena etc. R. R. Co.* v. *Yarwood*, 17 Ill. 509, 519; 65 Am. Dec. 682; *Toledo etc. R'y Co.* v. *Beggs*, 85 Ill. 80, 83; 28 Am. Rep. 613; *Jeffersonville R. R. Co.* v. *Hendricks*, 26 Ind. 228, 231, 232; Thompson on Carriers, 210, 211; Deering on Negligence, sec. 101; 2 Shearman and Redfield on Negligence sec. 516, pp. 349, 350; 2 Thompson on Trials, secs. 1690, 1691.) A high rate of speed is not negligence *per se*, but it may become an element of negligence, and the jury may find it to be negligence, when taken in connection with the

surroundings. (*Salter* v. *Utica etc. R. R. Co.,* 88 N. Y. 42, 50, 51; *Artz* v. *Chicago etc. R. R. Co.,* 44 Iowa, 284, 285; *Peoria etc. R. R. Co.* v. *Reynolds,* 88 Ill. 418, 420–422; *Meloy* v. *Chicago etc. R'y Co.,* 42 N. W. Rep. 563–565; *Wallace* v. *St. Louis etc. R. R. Co.,* 74 Mo. 594, 597; 2 Shearman and Redfield on Negligence, sec. 460.) The question whether the rate of speed was excessive, when considered in the light of the circumstances, was a question for the jury. (*Frick v. St. Louis etc. R'y Co.,* 75 Mo. 595, 612; *Marcotte* v. *Marquette,* 47 Mich. 1, 8, 9; Deering on Negligence, sec. 241, p. 392; see also authorities *supra.*) In order to rebut the presumption of negligence arising from the upsetting of a carrier's vehicle, it is indispensable that the carrier should show the cause of the overturn. (*Boyce* v. *Cal. Stage Co.,* 25 Cal. 460, 468, 469; *Lawrence* v. *Green,* 70 Cal. 417, 421; 59 Am. Rep. 428; *Baltimore etc. R. R. Co.* v. *Worthington,* 21 Md. 275, 283; 83 Am. Dec. 578; *Carpue* v. *London etc. R'y Co.,* 5 Ad. & E., N. S., 747, 751; *Seybolt* v. *N. Y. etc. R. R. Co.,* 95 N. Y. 562, 568, 569; 47 Am. Rep. 75; *Breen* v. *N. Y. Central R. R. Co.,* 109 N. Y. 297; 4 Am. St. Rep. 450; 2 Am. & Eng. Ency. of Law, 768, tit. Carriers of Passengers.) To rebut the presumption of negligence, the carrier must establish that the accident could not have been prevented by the exercise of the highest possible degree of care and diligence on its part, whether in the management of its train or track. (*Baltimore etc. R. R. Co.* v. *Worthington,* 21 Md. 275, 282, 283; 83 Am. Dec. 578; *Eureka etc. R. R. Co.* v. *Timmons,* 51 Ark. 460; *Stokes* v. *Saltonstall,* 13 Pet. 181, 193; *Peoria etc. R. R. Co.* v. *Reynolds,* 88 Ill. 418, 420. Whether the presumption of negligence, arising from an overturn, has or has not been rebutted by the carrier, is a question for the jury. (*Sullivan* v. *Philadelphia,* 30 Pa. St. 234, 239, 240; 72 Am. Dec. 698; *Eureka etc. R. R. Co. v. Timmons,* 51 Ark. 460; *Seybolt* v. *N. Y. etc. R. R. Co.* 95 N. Y. 562, 569; 47 Am. Rep. 75; *Brehm* v. *Great Western R. R. Co.,* 34 Barb. 256,

271; 2 Thompson on Trials, sec. 1692.) The platform is intended as a place of ingress and egress, and the passenger has the legal right to use it as an appropriate means of escape in case of danger. (*Buel* v. *N. Y. Cent. R. R. Co.*, 31 N. Y. 314, 317; 88 Am. Dec. 271; Thompson on Carriers of Passengers, 261; *Central R. R. Co.* v. *Miles*, 88 Ala. 256.) A passenger cannot in law be charged with contributory negligence if, in the face of impending danger, and acting on the instinct of self-preservation, he seeks the means of escape which are at hand, even if in so doing he makes a mistake of judgment and plunges into greater danger. (*Lawrence* v. *Green*, 70 Cal. 417, 421, 422; 59 Am. Rep. 428; *Robinson* v. *Western Pac. R. R. Co.*, 48 Cal. 409, 421; *Lewis* v. *Riverside*, 76 Cal. 249, 250, 251; *Buel* v. *N. Y. Cent. R. R. Co.*, 31 N. Y. 314, 317–319; 88 Am. Dec. 271; *Wilson v. Northern Pac. R. R. Co.*, 26 Minn. 278, 282–285; 37 Am. Rep. 410; *Cuyler* v. *Decker*, 20 Hun, 173–175; *Iron R. R. Co.* v. *Mowery*, 36 Ohio St. 418, 419, 422; 38 Am. Rep. 597; *Smith* v. *St. Paul*, 30 Minn. 169, 171; 50 Am. 550; *Nelson* v. *Atlantic R. R. Co.*, 68 Miss. 593, 595; *Dyer* v. *Erie R'y*, 71 N. Y. 228, 234–236; *East Tennessee etc. Railroad v. Gurley*, 12 Lea, 46, 62, 63; *Railroad Co.* v. *Aspell*, 23 Pa. St. 147, 150; *Georgia R. R. Co.* v. *Rhodes*, 56 Ga. 645, 648; *Roll* v. *Northern C. R. R. Co.*, 15 Hun, 496, 502; *Twomley* v. *Central Park etc. R. R.*, 69 N. Y. 158, 160; 25 Am. Rep. 162; *Pittsburg etc. R. R.* v. *Robinson*, 29 Alb. L. J. 96, 97; *Spicer* v. *Chicago etc. R'y Co.*, 29 Wis. 580, 582; *Ingalls* v. *Bills*, 9 Met. 3, 15; 43 Am. Dec. 346; *Southwestern R. R.* v. *Paulk*, 24 Ga. 356, 365, 366; *Jones* v. *Boyce*, 1 Stark. N. P. 493; *Cook* v. *Parham*, 24 Ala. 21, 34, 35; *Eckert* v. *Long Island R. R.*, 57 Barb. 555, 560; *Stokes* v. *Saltonstall*, 13 Pet. 181, 193; *Coulter* v. *American etc. Ex. Co.*, 56 N. Y. 585, 586, 588; *Schultz* v. *Chicago etc. R. R.*, 44 Wis. 638, 644, 645; 58 Am. Rep. 881; *Wilds* v. *Hudson River R. R.*, 33 Barb. 503, 507, 508; *Central R. R.* v. *Roach*, 64 Ga. 635, 637, 640, 641; *Mark* v. *St. Paul etc. R. R.*, 30 Minn. 493, 495, 496; *Pittsburg etc.*

R'y v. *Martin,* 82 Ind. 476, 487; *Gurnz v. Chicago etc. R. R. Co.,* 52 Wis. 672, 679, 680; *Galena etc. R. R.* v. *Yarwood,* 17 Ill. 509, 510, 521; 65 Am. Dec. 682; *Frink* v. *Potter,* 17 Ill. 406, 410, 411; Pierce on American Railroad Law, 475; Deering on Negligence, sec. 22; 1 Shearman and Redfield on Negligence, sec. 89, and cases cited; 2 Id., sec. 519; Thompson on Carriers, 266, 267; Beach on Contributory Negligence, secs. 14, 53, and cases cited; Wharton on Negligence, secs. 93, 94, 304, 377, and cases cited; 4 Am. & Eng. Ency. of Law, 49, 50, tit. Contributory Negligence, and cases cited in note.) The fact that other passengers remained in the car or coach and escaped without injury, or that the passenger himself, if he had remained, would have been unhurt, has been held not to militate against the right of recovery. (*Buel* v. *N. Y. Central,* 31 N. Y. 314, 319; 88 Am. Dec. 271; *Pittsburg* v. *Rohrman,* 29 Alb. L. J. 96, 97; *Iron Railroad Co.* v. *Mowry,* 36 Ohio St. 418, 419, 422; 38 Am. Rep. 597; *Cuyler* v. *Decker,* 20 Hun, 173–175; *Twomley* v. *Central Park R. R.,* 69 N. Y. 158, 160, 25 Am. Rep. 162; *Wilson* v. *Northern Pac. R. R. Co.,* 26 Minn. 278, 283, 284; 37 Am. Rep. 410; *Georgia R. R.* v. *Rhodes,* 56 Ga. 645, 648.) Whether or not a passenger is negligent in seeking escape by the platform of a car, when a collision or other catastrophe is imminent, is a question for the jury. (*Buel* v. *N. Y. C. R. R. Co.,* 31 N. Y. 314–319; 88 Am. Dec. 271; *Iron R. R. Co.* v. *Mowry,* 36 Ohio St. 418–422; 38 Am. Rep. 597; *Pittsburg* v. *Rohrman,* 29 Alb. L. J. 96, 97; *Collins v. Albany etc. R. R.,* 12 Barb. 492, 495; see also authorities *supra.*) It is not negligence *per se* for a passenger to leave, or attempt to leave, a moving train. Whether or not it is negligence, is for the jury, in view of all the circumstances. (*Little Rock etc. R. R. Co.* v. *Atkins,* 46 Ark. 423; *Raben* v. *Central Iowa R. R. Co.,* 73 Iowa, 579; 5 Am. St. Rep. 708; Beach on Contributory Negligence, sec. 53; Wharton on Negligence, p. 340, sec. 380.) There was no prejudicial error in excluding the testimony of witness Smith that

the conductor had returned into the car before the accident; for by the previous evidence of the conductor himself, uncontradicted and unobjected to, it was shown that he had returned to the car. (*People* v. *Salorse,* 62 Cal. 139, 145; *Barilari* v. *Ferrea,* 59 Cal. 1, 4; *Branson* v. *Caruthers,* 49 Cal. 374, 381; *People* v. *Woody,* 48 Cal. 80, 83; *Hicks* v. *Whiteside,* 23 Cal. 405, 407; *People* v. *Westlake,* 62 Cal. 310.) The court committed no prejudicial error in excluding testimony to the effect that no passenger, other than plaintiff, left the car. (*Buel* v. *N. Y. Central,* 31 N. Y. 314, 319; 88 Am. Dec. 271.)

PATERSON, J.—This is an action to recover damages for personal injuries sustained by plaintiff while traveling as a passenger on one of defendant's trains.

Appellant contends that the judgment and order should be reversed, because plaintiff failed to show negligence in the management of the train, or any defect in the defendant's railroad track.

It is doubtless true, as claimed by appellant, that in cases of this character the burden of proof is upon the plaintiff to establish negligence on the part of the defendant, and that the mere fact that a passenger was injured while on his journey is not sufficient to raise a presumption of negligence on the part of the carrier. But in this case not only is the injury admitted, but the derailment and overturning of the car are undisputed facts, and there is evidence tending to show that at the time the accident occurred the train was running down a steep incline leading to the bed of a river, on a new and curved track, at an unusual and dangerous speed. This showing was sufficient to throw upon the defendant the burden of proving that the injury was not caused by any want of care on its part. (*Boyce* v. *Cal. Stage Co.,* 25 Cal. 460; *Lawrence* v. *Green,* 70 Cal. 417; 59 Am. Rep. 428; *Treadwell* v. *Whittier,* 80 Cal. 574; 13 Am. St. Rep. 175; *Breen* v. *N. Y. C. R. R. Co.,* 109 N. Y. 297.)

At the time the accident occurred the plaintiff was standing on the platform of the smoking-car, and it is claimed that he cannot recover for the injury sustained by him, and that defendant is relieved from responsibility therefor by the provisions of section 484 of the Civil Code, which reads as follows: "Every railroad corporation must have printed and conspicuously posted on the inside of its passenger-cars its rules and regulations regarding fare and conduct of its passengers; and in case any passenger is injured on or from the platform of a car, or on any baggage, wood, gravel, or freight car, in violation of such printed regulations, or in violation of positive verbal instructions or injunctions given to such passenger in person by any officer of the train, the corporation is not responsible for damages for such injuries, unless the corporation failed to comply with the provisions of the preceding section." Plaintiff admitted at the trial that defendant had proper notices, as required by this section, posted in all of its cars, and that he had full knowledge of their contents before the accident. He testified that he had gone out upon the platform immediately before the accident, in consequence of the fear that some disaster would occur; that his attention was directed to the speed of the train as soon as it passed over the top of the grade and began to descend; that the great and unusual speed at which the train was going, taken in connection with the fact that the road was new and temporary, led him to believe that an accident would occur, and that he went out upon the platform intending to jump therefrom to the sand on the inside of the curve, where he believed he would escape with less injury than if he remained in the car, and that he had no sooner reached the platform than the car was overturned and he was thrown upon the ground; that he had been for a long time in the employ of Wells, Fargo & Co., had acquired a knowledge and skill as to the movement of trains, could distinguish between the degrees of speed by the motion

of the train, and that the train ran faster on the day of the accident than ever before.

The evidence of the defendant tends to show that the plaintiff had been upon the platform several minutes before the accident occurred, but if the jury believed the testimony of the plaintiff, it was for them to say whether the circumstances were such as would lead a person of ordinary prudence to act as the plaintiff did. The inquiry is, Where there has been an unsuccessful attempt to escape danger in an accident, was the attempt which was made an unreasonable or rash act? or was it one which a person of ordinary care and prudence might do under the circumstances? The answer to this inquiry cannot be made to depend upon the result of the attempt to escape, nor upon the result which would have occurred if the attempt had not been made. It would be unreasonable to require a passenger in case of accident to judge with absolute certainty the degree of danger attending him if he made no effort to escape, and the absolute consequences of an effort to escape. He must act upon the probabilities of an effort to escape as they appear to him, and choose that hazard which seems to him, as a person of prudence, to be the least. Of course, the facts that he was injured in the attempt to escape, and that those who remained in the car escaped without injury, are circumstances which the jury should consider in determining whether he acted as a man of ordinary prudence would under the circumstances; but where he has acted in the manner described, it cannot be said that his attempt to escape constituted contributory negligence. (*Twomley* v. *C. P. N & E. R. R. Co.,* 69 N. Y. 160; 25 Am. Rep. 162; *Iron Railroad Co.* v. *Mowery,* 36 Ohio St. 418; 38 Am. Rep. 597.)

In *Buel* v. *N. Y. C. R. R. Co.,* 31 N. Y. 319, 88 Am. Dec. 271, the court said: "The statute exempts a railroad company from liability to a passenger who shall be injured while on the platform of a car, etc., in violation

of the printed regulations of the company, posted up at the time, in a conspicuous place, inside of its passenger-cars then in the train; provided the company, at the time, furnished room inside its passenger-cars sufficient for the proper accommodation of the passengers. (Laws of 1850, c. 140, sec. 46.) There was in this case a printed regulation pursuant to this statute posted in a conspicuous place inside the car, prohibiting passengers from standing or riding on the platform of any car. But neither the statute nor the regulation has any application to a case like the present one. . . . . The statute was intended to prevent the imprudent act of standing or riding on the platform, but not to absolve railroad companies from responsibility for every injury which might happen at that place when a passenger is passing over it, while justifiably entering or leaving the cars." In that case it was held that although the plaintiff was injured while attempting to escape from the car in a collision, and although the passengers in the same car with him, who kept their seats, escaped uninjured, he could not be held guilty of contributory negligence; that he acted with ordinary care and prudence.

We have carefully examined the instructions of the court to the jury, and find no error in any of them.

The court erred in sustaining plaintiff's objections to the questions asked by defendant as to the conduct of the passengers who remained in the car, and whether any of them was injured. Evidence of the action of other passengers in such cases is competent as a part of the *res gestæ,* and to show what they, being in the same dangerous situation, deemed prudent conduct. They all had an equal interest in protecting themselves, and will be presumed to have done what appeared to them to involve the least hazard.

This error was cured, however, by other testimony—which appears not to be disputed—showing that there were only three passengers in the car besides plaintiff,

and that they all remained in their seats until the car was overturned, and all escaped unhurt.

There is another error assigned, based upon the refusal of the court to allow defendant to ask how often plaintiff had traveled over the road prior to the accident; but as evidence on the topic went in afterwards without objection, no prejudice can be predicated on the ruling complained of.

There was one error which we think was prejudicial, and which entitles the appellant to a new trial. The plaintiff testified that the car left the track immediately after he reached the platform; that "just as I [he] had stepped out of the car door the crash came." It was claimed by the defendant, and it attempted to show by evidence, that plaintiff was improperly on the platform; that he was not there through fear of an accident; that he had been standing on the platform in violation of its regulations several minutes before the accident occurred, and was consequently guilty of contributory negligence. The conductor testified that he left the smoking-car two or three minutes before the accident occurred, and that plaintiff went out with him; that the train was not going as fast then as it had on former occasions at the same point, and while plaintiff was on board; that he gave the brakeman orders to let off the brakes, walked back into the smoking-car and took his seat, while the plaintiff remained standing on the platform. The defendant then called S. W. Smith, who was one of the three passengers in the car at the time of the accident, and he was asked to state whether Mr. Clark, the conductor, returned into the smoking-car after he and plaintiff left it, and before the accident occurred. Plaintiff objected to the question, on the ground that it was immaterial; the court sustained the objection, and defendant excepted.

The question whether plaintiff went upon the platform under the circumstances narrated by him was a most important one; in fact the main question in the case is,

whether he acted as a prudent man would under the circumstances. In determining that question, the length of time he remained upon the platform, and the conduct of others on the train, including the officers of the train, is material, competent, and important. The testimony of the conductor, if true, would tend, not only to impeach the testimony of the plaintiff as to the length of time he stood on the platform, but directly to prove that there was no apparent reason for alarm at the time the accident occurred. To enable the jury to decide whether the conductor's account of the circumstances, or that of the plaintiff, was correct, the testimony of Smith, a disinterested witness, might have been important. It certainly was material and competent, and should have been admitted.

Judgment and order reversed, and cause remanded for a new trial.

McFARLAND, J., FOX, J., and BEATTY, C. J., concurred.

WORKS, J., concurred in the judgment.

SHARPSTEIN, J., dissented.

THORNTON, J., dissenting.—I dissent. The exclusion of the testimony of Smith on which the reversal is ordered could not possibly have caused any injury to the defendant. Evidence of the return of the conductor before the catastrophe occurred in which the plaintiff was injured was already in and uncontradicted. The conductor had already testified to the fact of such return. The time of the return of the conductor from the platform could not possibly show how long the plaintiff stood on the platform, as the conductor, when he returned, left the plaintiff standing on the platform. The evidence shows that the conductor and plaintiff went on the platform at the same time. The conductor returned, leaving plaintiff on the platform. How could the time of the

return of the conductor show how long plaintiff remained on the platform after such return? If the return of the conductor from the platform could show anything as to the time that the plaintiff remained on the platform after such return, the fact of his return was already in evidence and uncontradicted. A case carefully and laboriously tried should not be sent back for a new trial for an error, if any, so trifling.

Rehearing denied.

[No. 20724. In Bank.—December 12, 1890.]

EX PARTE LIZZIE WILLIAMS, ON HABEAS CORPUS.

CONSTITUTIONAL LAW—HOUSE OF CORRECTION IN SAN FRANCISCO—LOCAL LEGISLATION—PUNISHMENT OF CRIME.—The act of 1878 providing for the sentencing of certain prisoners convicted of felonies or misdemeanors in the city and county of San Francisco to the house of correction in said city and county, in the discretion of the court, is not special or local, either for the punishment of crimes or misdemeanors, or for regulating the practice of the courts of justice, and is not in conflict with section 25, article 4, of the constitution.

ID.—JURISDICTION OF SUPERIOR COURT OF SAN FRANCISCO.—The superior court of the city and county of San Francisco is the constitutional successor of the municipal criminal court of the city and county of San Francisco, as respects all cases of felony formerly committed to the jurisdiction of that court, and it is its province and right, as the successor of the municipal criminal court, to sentence to the house of correction persons convicted of felony in said city and county who are of the same class as might have been placed therein by the municipal criminal court under the act to establish the house of correction.

ID.—CONSTRUCTION OF STATUTE.—The power of the superior court to sentence a defendant convicted of felony in the city and county of San Francisco to the house of correction therein, under the terms of the act of 1878, is not affected by the act of 1885 "to provide for the commitment of persons convicted of crime to the house of correction," which relates only to minor offenses, punishable by imprisonment in the county jail, without regard to age.

ID.—AGE OF PRISONER CONVICTED OF FELONY—PRESUMPTION—HABEAS CORPUS.—Where the record is silent as to the age of a prisoner committed to the house of correction upon conviction of a felony, the court must be presumed to have discharged its duty in ascertaining the fact that the prisoner was under twenty-five years of age at the date of judgment;

and whether the finding be evidenced by the record or by the presumption of law, its correctness can only be reviewed upon appeal under a bill of exceptions, and cannot be inquired into upon *habeas corpus*.

APPLICATION to the Supreme Court for the discharge of the petitioner upon a writ of *habeas corpus*. The facts are stated in the opinion of the court.

N. S. Wirt, for Petitioner.

The COURT.—In this case, by leave of the court, an amended petition was filed after the decision which was filed July 24, 1890, and on such amended petition the petitioner was permitted to reargue the case on the question of the constitutionality of the act of 1878, under which petitioner was sentenced to the house of correction.

After a patient hearing and investigation, we deem it necessary only to add to that which was said in our former opinion, that in our judgment the act is not in conflict with section 25, article 4, of the constitution. It is not special or local, either for the punishment of crimes or misdemeanors, or regulating the practice of courts of justice. The laws for the punishment of crimes and misdemeanors are uniform throughout the state, in the matter of determining what is a felony and what a misdemeanor, and the legal consequences flowing from the conviction of either. They are uniform in prescribing the punishment of imprisonment (when such punishment is allowed at all) for each of the several offenses for which that punishment is provided. This act does not change the punishment or the degree of the crime. All that it does is to authorize the court in San Francisco, in its discretion, to cause the punishment to be inflicted in one place, instead of either of two or three others where it might be done. If the legislature has no power to authorize courts to do this, then it is powerless to provide for imprisonment for felony in more than one place in the state. We find no such limitation upon the

power of the legislature in the premises. If, as is claimed in argument, the imprisonment must be in a state prison, in order to be equal and uniform, then there must be but one state prison; for if more than one, even though the government and discipline in all be the same, it would be impossible that the climatic and other conditions would be the same, and hence the conditions of punishment would be unlike. Such cannot be the meaning of the constitution or the law. It is the *fact* of imprisonment, and the labor during confinement, and the civil consequences that attach to the conviction, that constitute the punishment, and not the place where the imprisonment is carried out.

Nor is the act one regulating the practice in courts of justice. Practice is that course of proceeding by which the investigation is had and the judgment reached. When reached, the place and manner of executing the judgment (it being uniform in character with other judgments in like cases) is subject to legislative discretion; and the legislature may prescribe that all judgments, upon conviction for felony, shall be executed in one place, or that those in different parts of the state may be executed in different places, or having prescribed different places for such purposes, it may, as it has, leave it to the discretion of the court in each instance to determine in which of them the judgment shall be executed.

Let the writ be discharged, and the prisoner remanded.

The following is the former opinion above referred to, rendered in Bank on the 24th of July, 1890:—

Fox, J.—Lizzie Williams, on whose behalf this proceeding is taken, was convicted in the superior court of the city and county of San Francisco of grand larceny, and on the eighteenth day of October, 1889, was by the court committed to the house of correction for the period of two years, where she has ever since been and now is

confined in pursuance of said judgment and commitment.

1. The first point made on this hearing is, that the prisoner was over twenty-five years of age at the time of the pronouncing of the judgment, by reason whereof the court had no jurisdiction to sentence her to confinement in the house of correction.

Whether a prisoner is or is not over twenty-five years of age is a question of fact to be determined by the court giving the judgment, at or before the time of pronouncing the same. If it should appear affirmatively, from the record, that the court found the prisoner to be over twenty-five years of age, then we should be compelled to hold, on the face of the record, that a judgment of confinement in the house of correction was void. What we should deem it our duty to do with the prisoner in such case, there being a valid conviction, but no judgment, it will be sufficient to determine when the question arises; it does not arise in this case.

If the record was silent on the subject of age, it being a case where written findings are not required, the presumption would be, that the court had done its duty, and found the fact to be such as to warrant the judgment given.

In this case, a certified copy of the judgment is brought up and offered in evidence, and it appears upon the face thereof that the court found the prisoner to be under the age of twenty-five years. Whether the finding be evidenced by the record or by the presumption of law, its correctness cannot be inquired into in this court upon *habeas corpus*. If the court erred in its finding, the error can only be reviewed upon appeal, the evidence and the rulings of the court being brought up on bill of exceptions.

2. The next point insisted upon is, that no court, except the police court, has jurisdiction to sentence any person to confinement in the house of correction.

This point is not well taken. Before the adoption of the present constitution, by the act entitled "An act in relation to the house of correction of the city and county of San Francisco" (Stats. 1878–79, p. 953), the city criminal court, or the municipal criminal court of the city and county, was authorized in any case where a prisoner, upon conviction, might be sentenced to imprisonment in the county jail or in the state prison, instead thereof to sentence such person to imprisonment in the house of correction, provided that no person should be so sent to the house of correction who was over twenty-five years of age. Upon the adoption of the constitution, by section 3, article 22, thereof, all the courts of the state theretofore existing, except justices' and police courts, were abolished; but the power of the state, through the judicial department of its government, to punish for public offenses was not thereby lost. All the laws of the state as to the measure and mode of punishment, not inconsistent with the constitution, and as to what should constitute public offenses, remained in full force; jurisdiction to administer them being by proper constitutional and legislative enactment transferred to the new courts established by or under the constitution. By article 6, section 5, jurisdiction in all cases amounting to felony (of which this is one) was vested in the superior court. By operation of the constitution itself, therefore, the superior court became vested with jurisdiction in all cases of felony, and succeeded to all other courts which theretofore had possessed jurisdiction in such cases.

As the laws prescribing the mode and measure of punishment of felonies were not changed by the constitution, it was the duty and within the power of the superior court to administer those laws in the same manner and to the same extent as other courts theretofore had jurisdiction to do. For cases pending, in order that there should be no abatement or loss of jurisdiction,

it was deemed necessary to provide for the transfer of the causes, and the records thereof, from the old courts to the new, and this was done by section 3, article 22, of the constitution, and subsequently, and more in detail, by an act of the legislature passed for that special purpose, approved February 4, 1880. (Stats. 1880, p. 2.) By section 2 of that act it is expressly provided that the superior court shall for all purposes be the successor of (among others) the municipal criminal court and the city criminal court. It is claimed that this act, if construed as for any other purpose than to provide for the transfer of the records of and giving jurisdiction in pending cases, is void, because such other purpose is not expressed in the title of the act. It is unnecessary to discuss that contention here, for the reason, as we have already shown, that the constitution itself conferred the jurisdiction in all cases of felony, and it became the duty of the court upon which such jurisdiction was conferred to administer the laws as it found them until they were changed. See also *Shay* v. *Superior Court,* 57 Cal. 542, where it was expressly held that the superior court had succeeded "to all the powers and jurisdiction of the . . . . municipal criminal court."

3. It is further contended that even if the superior court once had power to sentence a defendant convicted of felony to confinement in the house of correction, it no longer has such power, by reason of the provisions of the act of March 9, 1885, entitled "An act to provide for the commitment of persons convicted of crime to the house of correction." (Stats. 1885, p. 34.) A careful examination of that act, however, will show that it does not in any manner affect the question of the power of the court to commit to the house of correction upon conviction for felony. It relates only to cases of minor offenses, where the punishment may be imprisonment in the county jail, and its effect is, in such cases, to take off the limitation of age, and allow the court to send persons

convicted of such offenses to the house of correction, without regard to age.

Writ discharged, and prisoner remanded.

BEATTY, C. J., SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 12800. In Bank.—December 12, 1890.]

THE CITY OF NAPA, RESPONDENT, *v.* J. H. HOWLAND, APPELLANT.

DEDICATION OF LEVEE AND STREET—DESIGNATION UPON CITY MAP—EJECTMENT BY MUNICIPAL CORPORATION—FINDINGS—EVIDENCE—REVIEW UPON APPEAL.—In an action of ejectment brought by a city, where the court finds that the land sued for had been dedicated by the owners for the use of the public as a levee and street, and the finding is sustained by the evidence, a judgment in favor of the city is supported by such finding; and a subsequent finding that the land, by the direction of the owners, had, after such dedication, been so designated on the maps of the city, is immaterial, and may be excluded from consideration upon appeal, although not supported by the evidence.

ID.—EVIDENCE—MAPS NOT MADE BY OWNER—WAIVER OF OBJECTION.—Where recorded maps produced upon the question of dedication are admitted subject to further proof that they were made and recorded by a real owner of the land, or for a limited purpose as explanatory diagrams, objection is waived if there is no motion to strike them out for want of further evidence, and no exception is taken to their admission, and they are referred to on the argument of the case by both parties in considering and discussing their effect as evidence on the question of dedication.

ID.—MAP MADE AT REQUEST OF OWNER.—A map made and recorded at request of a former owner of the premises is admissible as evidence against his grantees upon the question of dedication by the former owner.

ID.—DEDICATION FOR PUBLIC "LANDING"—"LEVEE."—Evidence showing a dedication of land for a public landing will support a finding of a dedication as a public levee and for street purposes. The word "levee," as applied to portions of the public highways bordering on navigable streams and sloughs in interior cities and towns, has the same meaning as landing.

ID.—DEDICATION BY MEXICAN GRANTEE—ESTOPPEL—AFTER-ACQUIRED TITLE.—If it be assumed that the owner of an unconfirmed Mexican grant had no title to the lands at the time he dedicated a levee and street to public use, he and his grantees are nevertheless estopped from denying the fact of dedica-

tion; and a title subsequently acquired by confirmation of the grant by the board of land commissioners and patent from the United States feeds the estoppel.

EJECTMENT — PARTIES — LANDLORD AND TENANT—ACTION AGAINST LANDLORD—DEMAND OF POSSESSION—ADMISSION.—Where the defendant in an action of ejectment, upon being served with a notice demanding possession of the premises, admitted that he held possession of the property, but refused to surrender it, it is not necessary that a tenant from month to month, to whom he had rented the property, be made a party defendant to the action.

APPEAL from a judgment of the Superior Court of Napa County, and from an order denying a new trial.

The land in controversy was included within the exterior boundaries of a tract deeded to Nathan Coombs on the 6th of December, 1848, by one Nichols Higuera, a grantee of the Mexican government. The Thompson map referred to in the opinion was a recorded map of a portion of the city of Napa, made by the county surveyor for Joseph B. Thompson on the 22d of April, 1857, and was allowed in evidence subject to being supported by the evidence as to whether it was made by a real owner of the premises in controversy. The Pierce maps referred to in the opinion consisted of a recorded map of Napa City and additions, made in 1869 by W. A. Pierce, surveyor, and another recorded map, entitled "Revised map of the city of Napa and surroundings, 1879, compiled and drawn by W. A. Pierce." The latter maps were objected to as not being made by any owner of the lands, but were admitted without objection, for the limited purpose of explaining the relative location of other diagrams. All the maps were referred to on the argument of the case. Further facts are stated in the opinion of the court.

F. E. Johnston, and *M. M. Estee,* for Appellant.

O. R. Coghlan, for Respondent.

PATERSON, J.—This is an action of ejectment. The main question involved in the issues is, whether the lands

in controversy have ever been dedicated for the use of the public as a levee and street. The court found, from the evidence, that the property was dedicated to public use by the owners thereof about the year 1850, and that ever since said dedication the land has, by direction of the owners of the fee thereof, been designated and represented on the maps of the city of Napa as public streets and levees; that the public used the same exclusively until March 1, 1875, when defendant, without authority or right, ousted plaintiff therefrom, and has ever since wrongfully held exclusive possession of the property. The plaintiff had judgment against defendant for the possession of the lands, but the defendant was permitted to remove his warehouses and fences.

1. The evidence on behalf of the plaintiff is ample to support the finding as to dedication.

2. The court found (finding 2) that the land had been dedicated by the owners, Coombs and others. This was the ultimate and essential fact; and the subsequent finding, that the land, by direction of the owners, had, *after such dedication,* been designated on the maps of the city, was a finding upon an immaterial matter, at least upon a matter that was not controlling. The latter finding may be excluded as not supported by the evidence, and yet the judgment will be supported by the finding upon the question of dedication. The maps were not necessary to support the finding of dedication. The evidence of the acts and declarations of Coombs was sufficient to show a dedication.

3. If it be assumed that Coombs had no title at the time he dedicated the property, he and his grantees are nevertheless estopped from denying the fact of dedication. His claim was confirmed by the board of land commissioners in April, 1854, and a patent was issued to him in 1866. His newly acquired estate "feeds the estoppel." (Goddard on Easements, 95, and cases cited

in note; Tyler on Ejectment, 725, 726; Washburn on Easements, 62.)

4. When the city marshal served a notice on defendant, demanding that he deliver up possession of the premises, the defendant admitted that he held possession of the property, and said he would not surrender it. This testimony of the marshal was not contradicted by defendant. The premises were in possession of a tenant of defendant under a letting from month to month. Under these circumstances it was not necessary that the tenant be made a party defendant. (*Finnegan* v. *Carraher,* 47 N. Y. 497.)

5. It is claimed that the court erred in its ruling in regard to the Thompson and Pierce maps. If the evidence necessary to render them proper for consideration under the ruling of the court was not produced by plaintiff, the defendant ought to have moved to strike them out. Instead of calling the attention of the court, when plaintiff rested its case, to the fact that there was no evidence showing that the former owners of the land had made, filed, or adopted the maps, counsel for defendant, in the argument of the case, considered and discussed the effect of the maps as evidence on the issue of dedication or no dedication. Therefore if it be assumed that there was, at the time that the maps were offered and admitted in evidence, an express and binding understanding between counsel and the court such as is claimed, we think that the failure to move to strike them out, and the manner in which they were treated by counsel in the argument, constituted a waiver of the limitation. Furthermore, there is no exception in the record upon which error can be predicated. There is no ruling which we can review.

The court did not err in admitting the map called "Plan of Napa City, filed for record at the request of Nathan Coombs."

6. It is said that the evidence does not support the

finding of dedication "as a public levee and for public street purposes," because it shows a dedication, if any, for a public *landing*.

It matters but little what name is given to the place, so long as the fact appears that it was dedicated for public use. "A landing is a bank or wharf to or from which persons may go from or to some vessel in the contiguous water." (*State* v. *Graham*, 15 Rich. 310.) The word "levee," as applied to portions of the public highways bordering on navigable streams and sloughs in the interior cities and towns of this state, has the same meaning as *landing*.

The judgment and order are affirmed.

FOX, J., WORKS, J., MCFARLAND, J., and SHARPSTEIN, J., concurred.

Rehearing denied.

[No. 14018. Department Two.—December 13, 1890.]

H. WIDMER, RESPONDENT, *v.* J. M. MARTIN, APPELLANT.

JUDGMENT ON PLEADINGS—MATERIAL ISSUE.—A judgment on the pleadings cannot be taken where a single material issue is presented by the answer.

ID.—ACTION TO RECOVER DEPOSIT — VENDOR AND PURCHASER—DEFECTIVE TITLE.—In an action by the vendee to recover back a deposit made under a contract for the purchase and sale of land, by the terms of which the vendor was to convey the land as soon as he received a deed, and in case of a defective title, to return the deposit made, where the complaint alleged a demand by the plaintiff for a conveyance, and a refusal by the defendant to convey, on the ground of an alleged defective title, an answer denying such allegations, and alleging that the defendant expects to be and will be able soon to obtain the legal title, raises material issues, which the defendant is entitled to have tried, and a judgment on the pleadings in favor of the plaintiff is erroneous.

APPEAL from a judgment of the Superior Court of Fresno County.

The facts are stated in the opinion of the court

Church & Cory, for Appellant.

Firman Church, for Respondent.

MCFARLAND, J.—Defendant demurred to the complaint, and his demurrer was overruled. He then duly served and filed a verified answer, whereupon plaintiff moved for judgment upon the pleadings, and judgment was accordingly given for plaintiff upon the pleadings alone. From this judgment defendant appeals.

The practice of moving for judgment upon the pleadings in proper cases has been sanctioned by this court; but we think that in the case at bar the answer contained denials of material averments of the complaint, waiving the question of the sufficiency of the complaint itself.

The action is to compel defendant to return to plaintiff the $484, which constituted the first payment made by plaintiff to defendant on the following contract:—

"FRESNO, January 19, 1888.

"Received of H. Widmer the sum of $484 as a deposit on lots 1, 2, 3, 4, 5, 6, 7, and 8, in block 3 of the Donahou Addition to the town of Fresno; the purchase price of said lots to be $1,450, payable as follows: $484 cash, $483 six months from date; and $483 twelve months from date; deferred payments to bear interest at the rate of ten per cent per annum from date until paid. This receipt is to be taken up and deed given and mortgage and notes received as soon as the undersigned shall receive deed to said addition. In case of defective title from any cause, I agree to return said deposit.

[Signed] "J. M. MARTIN."

The complaint contains a number of averments about what plaintiff did in performing his part of said contract, which are denied in the answer, and which are now claimed by plaintiff to have been immaterial; but

waiving the questions thus presented, it is clear that there is a denial of matter in the complaint that is material. It is apparent that the "defective title" mentioned in the contract did not refer to any title which defendant had, or professed to have, at the time the contract was made. The contract is based upon the mutual understanding that defendant then had no title, but was to get one through a certain deed which he was to receive in the future, and that he was to convey the property to plaintiff, and the latter was to give notes and a mortgage, "as soon as the undersigned shall receive deed to said Addition." No one would seriously contend that plaintiff could have maintained an action for the return of the first payment on the very next day after the date of the contract, on the ground that defendant's title was defective. Now, the complaint nowhere avers that the title which would come through said deed is defective; or that defendant cannot, or does not intend to, procure said deed, or had not exercised due diligence in trying to procure it; or that defendant had been guilty of unreasonable delay or neglect in the premises. The only averment in the complaint upon the subject is, that on a certain day plaintiff demanded of defendant a deed to said lots, and that defendant "then and there failed and refused to make and deliver said deed to said lots of land, alleging that the title to said land was in dispute and defective; and the plaintiff says the title *was and is* defective." But these averments are specifically denied. The defendant, in his answer, "denies that plaintiff demanded of said defendant a deed to the lots of land in said receipt described, at said time, or at any time; denies that he, defendant, said at that time, or at any time, that the title to said land was defective; denies that the title to said land is defective." The answer, in addition, states how defendant expects and will be able soon to obtain the legal title. The parts of the pleadings above referred to—waiving the other points made by

appellant—clearly raise material issues, which defendant is entitled to have tried. A single material issue precludes a judgment on the pleadings.

The judgment is reversed.

Sharpstein, J., and Thornton, J., concurred.

[No. 20733. In Bank.—December 13, 1890.]

Ex parte F. A. TAYLOR, on Habeas Corpus.

Municipal Ordinance—Regulation of Streets—Obstruction of Sidewalk—Constitutional Law.—An ordinance of the city of San Jose forbidding the obstruction of a sidewalk, and prescribing a penalty for refusal to remove the obstruction upon notice prescribed to be given by certain municipal authorities, such penalty being of the same character, though less in degree, as that prescribed by the general law, is valid, and not in conflict with the constitution or with the general law.

Id.—Legalization of Obstruction—Revocation of Authority—Public Offense.—Municipal corporation may legalize a partial obstruction of street or sidewalk which would otherwise be a public nuisance; but when it changes its ordinance so as to revoke the authority, and declare the obstruction unlawful, the obstruction is no longer legal, and the continuation of it thereafter constitutes a public offense, for which the party persisting therein is amenable to law.

Id.—Habeas Corpus—Jurisdiction of Justice's Court.—When the complaint for the violation of a municipal ordinance states facts which constitute a public offense, both under the ordinance and under the general statute, and both the offense and the penalty are within the jurisdiction of the justice's court, and the judgment is not in excess of that authorized by the general statute, the prisoner committed for such offense cannot be discharged on *habeas corpus*, whether the ordinance is valid or not.

Prescription—Obstruction of Sidewalk.—No right can be acquired by prescription to maintain an obstruction to a sidewalk in a street of a town or city.

Application to the Supreme Court for a writ of *habeas corpus*. The facts are stated in the opinion of the court.

Morehouse & Tuttle, for Petitioner.

William B. Hardy, City Attorney of San José, for Respondent.

Fox, J.—The petitioner is convicted of a violation of an ordinance of the city of San José in relation to streets and sidewalks.

It is claimed that the ordinance is void, because in conflict with the constitution and with general law, by reason whereof the city council had no authority to pass the same.

The city of San José is a municipal corporation existing under a special charter passed before the adoption of the present constitution. By section 9 of that charter the council is authorized and empowered "to pass all necessary and proper laws; . . . . to lay out, alter, vacate, improve, cleanse, water, and repair streets and sidewalks; . . . . to define, prevent, and remove nuisances; . . . . to impose and appropriate fines, penalties, and forfeitures for any and all violations of city ordinances; and for a breach or violation of any city ordinance, may fix the penalty by fine or imprisonment," etc. The ordinance referred to forbids the obstruction of the streets or sidewalks, and provides a penalty for the violation thereof. It is not contended that the act of the petitioner for which he was arrested and convicted was not a violation of the terms of the ordinance, or that the penalty imposed is in excess of or different from that authorized by the ordinance.

Reference is made in support of the petition to section 6, article 11, of the constitution. This is the section which provides that municipal corporations shall not be created by special laws, and that all charters heretofore granted shall be controlled by general laws. Upon the faith of this provision, it is claimed that a municipal corporation has no authority to determine and declare what shall constitute a nuisance upon a public street, and to provide for the punishment of one who maintains such a nuisance, because the general law has provided for the same. In support of that proposition we are cited to sections 370 and 372 of the Penal Code, and section

3479 of the Civil Code. Section 370 of the Penal Code and section 3479 of the Civil Code declare the obstruction of any public park, square, street, or highway a public nuisance; and section 372 of the Penal Code provides that one who maintains a public nuisance, or willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor, when the punishment for the offense is not otherwise prescribed. Punishment therefor is not otherwise prescribed in that chapter of the general law, but section 19 of the Penal Code declares that "except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or both." It thus appears that, under the general law, the obstruction of a street or highway is a nuisance; that a person maintaining a nuisance in the street is guilty of a misdemeanor, and is, upon conviction, punishable therefor as prescribed in said section 19. Is the ordinance in conflict with this general law?

We think not. The ordinance does not declare the obstruction of the street to be a nuisance or a misdemeanor, but, proceeding upon the theory that the state law itself so declares and provides, it simply forbids the obstruction, or declares that such obstruction shall be unlawful; in the exercise of its police power, and the authority expressly granted by the charter, it provides for the removal of the obstruction, and prescribes a penalty for refusal to remove it upon the notice prescribed to be given by the municipal authorities having charge of that department of the local government. That penalty is not of a different character or in excess of the one prescribed by the general law, but is of the same character, only less in degree. But why should the municipality legislate upon the subject at all? A brief review of the legislation, both state and municipal, and of the decisions

of this court, upon the subject, will furnish an instructive answer to this question.

Municipal charters have in this state universally conferred upon local municipal governments power to legislate for the maintenance and care of their public streets. It is conceded here, and this court has held, that streets include sidewalks, as well as the roadway (*Bonnet* v. *San Francisco,* 65 Cal. 230), and that the obstruction of a sidewalk is a public nuisance. (*Marini* v. *Graham,* 67 Cal. 130.) But in the latter case it was also held that a legalized obstruction of the sidewalk was not a nuisance. This was under an ordinance which, by implication, authorized the obstruction of a sidewalk to the extent of three tenths the width thereof. It thus recognized the fact that, notwithstanding the statute, the power of the municipality over the streets was such that it might make a legal authorization of an obstruction. The act constituting the offense in this case was the obstruction of the sidewalk for the depth of two feet in width and forty feet in length of the inner side thereof. The ordinance in this case, from the date of its passage, December 10, 1881, until amended, June 9, 1890, by clear implication, authorized the obstruction here made; but on the latter date it was so amended as to forbid it. This obstruction has been maintained for many years; but under the authority of *Marini* v. *Graham,* 67 Cal. 130, it could not be punished as a misdemeanor, because it was a legalized obstruction. Since the amendment, however, it has ceased to be legalized, and is now maintained in direct violation both of the statute and the ordinance. The passage of the ordinance in its original form was necessary to legalize the act, if it could be legalized; and as seen, this court has held that it could be so legalized, and the parties had the right to act upon the authority of that decision, so long as it remains unreversed. The effect of the amendment was to render the act no longer legal, and the continuance of the act thereafter consti-

tuted a public offense, for which the party was and is amenable to law.

A somewhat similar question to the one here under consideration arose under the same general laws, and a municipal ordinance, in the case of *Ex parte Casinello,* 62 Cal. 538, and the conviction and judgment was there held valid.

We are of the opinion that the city of San José had authority, under its charter, to pass the ordinance, that the same is not in conflict with the general law, and that a conviction under either is a bar to a prosecution under the other. Even if this is not so, the prisoner is not entitled to be discharged; for it is conceded that the acts charged constitute a violation of the statute in relation to the obstruction of streets. The complaint states facts which constitute a public offense under the statute, and alleges that they were done "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of California," and the judgment is not in excess of that authorized by the statute. Both the offense and the penalty was within the jurisdiction of the justice's court.

In *Ex parte Sic,* 73 Cal. 142, relied upon by the petitioner, the question whether the judgment was valid notwithstanding the invalidity of the ordinance was not raised or considered.

The defendant has acquired no right to maintain the obstruction by prescription; for none such could be so acquired. (*Hoadley* v. *San Francisco,* 50 Cal. 265; *People* v. *Pope,* 53 Cal. 437; *City of Visalia* v. *Jacob,* 65 Cal. 434; 52 Am. Rep. 303.)

Let the writ be discharged, and the prisoner remanded.

SHARPSTEIN, J., THORNTON, J., and BEATTY, J., concurred.

PATERSON, J., concurred in the judgment, on the ground last stated by Mr. Justice Fox.

McFARLAND, J., concurring.—I concur in the judgment. The defendant was convicted of placing and suffering to remain on the inside of a sidewalk something which obstructed the free passage of said sidewalk; and I do not think that an ordinance making such act an offense is in conflict with the general law of the state found in section 370 of the Penal Code, which declares the obstruction of a lake, river, park, street, highway, and other enumerated places to be a public nuisance, and the person who maintains it to be guilty of a misdemeanor. There are many matters connected with streets, sidewalks, awnings, trap-doors, etc., which are particularly within the scope of municipal regulation, and which cities and towns may legislate about without intruding upon any general law now in existence. The charter of San José giving power to pass the ordinance in question was enacted after said section of the code, and it is evident that the legislature by passing a law preventing nuisances on public highways throughout the state at large did not intend to prohibit the municipality from dealing further with streets and sidewalks within its corporate limits. The matter involved in *Ex parte Sic*, 73 Cal. 142, was smoking opium and maintaining places where that vice might be practiced; and the legislature had legislated upon that subject in great detail. The crime was the same in all parts of the state. But it is quite apparent that acts which would be of little consequence if done on public roads running through sparsely settled regions might be very serious evils if done on the crowded streets and sidewalks of populous towns and cities.

But I agree, also, that, in this particular case, the judgment can be sustained under the state law, even though the ordinance be considered invalid.

[No. 12862. In Bank.—December 13, 1890.]

JAMES MARTIN ET AL., RESPONDENTS, *v.* J. B. H. COOPER ET AL., APPELLANTS.

BOUNDARY—CHANGE IN BANKS OF RIVER—SURVEY—COURSES AND DISTANCES—WIDTH OF STREAM—FINDING AGAINST EVIDENCE.—Where adjoining tracts of land were separated by a river, and the patent to each tract was bounded by the bank of the river upon the side upon which the tract was situated, and the court below found that the river had so changed its channel that the location of the banks as they formerly existed could not be found or traced, if the evidence shows that the river varied in width at different points, a finding in favor of the correctness of a survey by courses and distances along the supposed original bank of the river as called for by defendant's patent, and laying off upon a map a line parallel thereto at a uniform distance therefrom as the boundary of plaintiff's tract, is not sustained by the evidence, and such erroneous finding is ground for reversal of a judgment in favor of plaintiff.

APPEAL from a judgment of the Superior Court of Monterey County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

William Matthews, for Appellants.

Julius Lee, for Respondents.

Fox, J.—This is an action to quiet title to a tract of land which the plaintiffs allege lies within the rancho Rincon de las Salinas, of which they are the owners, as tenants in common, seised in fee. The defendants deny that the plaintiffs are the owners of said tract of land, and aver that the same is a part of the rancho Moro Cojo, of which the defendants are the owners in fee. The court found in favor of the plaintiffs upon all the material issues, and decreed accordingly. Defendants moved for a new trial, which was denied, and from that order, and from the judgment, defendants appeal.

It was incumbent upon the plaintiffs to prove that the lands in controversy are within the rancho Rincon de

las Salinas. Whether they are or not depends upon the location of the northeasterly line thereof, which, according to the patent issued to the plaintiffs' grantor, is along the left bank of the Salinas River. The rancho Moro Cojo, under which defendants claim, lies upon the opposite side, and is bounded by the right bank of the river. The patent of neither rancho calls for the other as a coterminous boundary, but each is described as being bounded, along the sides which are nearest each other, by the river, one by the left bank and the other by the right bank, and in each courses and distances are given as the meander line of the bank referred to. In each case, if the bank can be found, courses and distances must yield to the natural monument. The survey for the patent of the rancho Rincon de las Salinas was made in 1861; that for the patent of the rancho Cojo, some three years earlier.

The court finds that since these surveys the course of the river has been subjected to several sudden, violent, and considerable changes, caused by freshets cutting away its banks and changing its channel. There is evidence sufficient to support this finding. But the court also finds that the left bank of the river, as it existed in 1861, cannot now be found or traced, and it therefore assumes to adopt the courses and distances given in the patent as establishing the boundary line, upon the theory that this is the next best evidence that is attainable for the purpose. The theory is correct, if the facts warrant its adoption; but we do not think that the evidence supports the finding that the left bank of this river, as it existed in 1861, cannot now be found or traced. While the testimony given on the part of plaintiffs shows that there has been a marked change in the course and banks of the river, and there is some evidence tending to show that at certain points the old banks have been washed away, it does not appear, even from this testimony, that there is not left sufficient evidence of the

location and general course of that old bank so that it may be traced with reasonable certainty and accuracy.

It does appear affirmatively that the surveys made on the part of the plaintiffs, for the purposes of this trial, were not made, or attempted to be made, on or along either bank, and that the surveyors were not instructed so to make them. Their instructions were, to survey and plat the courses and distances as given in the patent; and they were not instructed to find, or to attempt to find, the old bank of the river. And they did not even follow these instructions, but, instead, they surveyed and ran the courses and distances along the river bank as given in the patent of the rancho Moro Cojo, and platted the same, and then, for the purpose of establishing the line of the rancho Rincon de las Salinas, they laid it off upon the map by a line parallel to the line of the Moro Cojo, so surveyed, and a uniform distance of seven chains therefrom,—allowing that to be the width of the river running between the two ranchos; and this, even though the witness testified that the river, now and of old, varied in width at different points. We do not think that such testimony as this will support a finding, either that the left bank of the river cannot be found and traced, or that the survey adopted as and for that boundary is correct. The engineer who made this survey and map himself says that he would not have made it as he did if he had been instructed to find and survey the river bank.

On the other hand, another engineer, who seems to be equally competent and disinterested, testifies that he has examined the banks and course of that river, and that, in his opinion, the old bank can be found and traced. He has made a plat, showing the present bank, and points out divers places where the line of the old bank is distinctly traceable. His evidence is perhaps not sufficiently full, and his work not sufficiently complete, to furnish the basis of a finding for a final settlement of the

case; but, to our minds, it confirms a conclusion already reached, from the testimony given on the part of plaintiff, upon whom the burden rested, that the evidence is insufficient to support the findings, either that the survey of courses and distances adopted is accurate, or that circumstances existed which authorized the adoption of courses and distances in place of the natural monument.

The judgment and order must therefore be reversed, and it is so ordered.

THORNTON, J., and PATERSON, J., concurred.

MCFARLAND, J., concurring.—I concur in the judgment; but I do not concur in the main reason given for it in the leading opinion. Upon this present record, I think that the court below was justified in finding that the bank of the Salinas River, as it existed in 1861, cannot now be found or traced; and that, in the absence of that monument, it was proper to adopt the courses and distances given in the patent as establishing the boundary line. The evidence was not only conflicting on the point, but the weight of it was, in my opinion, with the finding. I think, however, that the evidence (although I am not without doubt on the subject) was not sufficient to support the conclusion that the true line of the Salinas rancho, run by courses and distances, is where the judgment establishes it to be. That line was never actually run by the surveyors who testified to it; but it was calculated and assumed from other *data* which I do not think sufficient to support the conclusion. They seem to have fixed a new line, rather than to have found an old one.

The case is a difficult one; and I doubt if a judgment will ever be obtained more favorable to appellants than this one from which they appeal. It is evidently a proper case for a compromise; but neither the court nor the surveyors can make a compromise for the parties which they will not make for themselves.

BEATTY, C. J., dissenting.—I dissent. The evidence, in my opinion, fully sustains the conclusion that neither bank of the Salinas River, as it existed in the years 1858–61, could be traced on the ground at the time this controversy arose. The course of the river had very greatly changed. At some points it had cut off portions of the Moro Cojo ranch, at others it had cut off portions of the Rincon de las Salinas, and these changes had been suddenly wrought, during high floods or freshets. At the places where the current had left the old channel, the space between the banks had been filled with sediment and overgrown with willows. The existing banks of the river no longer constituted the true boundaries of the respective tracts, and the old banks were no longer to be found.

If the owners of the Moro Cojo, the appellants, extended their possession to the right bank of the river, they would take land of the respondents, owners of the Rincon de las Salinas, and *vice versa*. Such being the case, I know of no means of determining the rights of the parties, except to retrace the patent lines of the two ranches, by following courses and distances, according to the field-notes, between such natural or other monuments on the ground, and called for in the field-notes, as are still capable of identification. This is what the parties attempted to do. Each employed a competent surveyor to trace out and re-establish the lines. The surveyors went on the ground, and by actual survey from a known monument, established the original southeastern corner of the Rincon de las Salinas ranch. At the time of the patent survey, this corner was on the left bank of the Salinas River, but was found, at the time of the last survey, to be a considerable distance beyond the opposite or right bank. An attempt was then made to run out the northeastern boundary of the Rincon de las Salinas, by following the courses and distances called for in the field-notes of the patent, but for some reason the attempt

was abandoned as impracticable. The two surveyors then located, by survey from natural monuments, the northwest and southwest corners of the Moro Cojo ranch, and retraced the line between them,—that is to say, they meandered a line which started from the northwest corner and closed upon the southwest corner; but in running this line they were compelled to depart from the courses called for in the field-notes of the patent, by 1° 47′. It is contended that they failed to correctly trace the southwest boundary of the Moro Cojo, by reason of this departure from the course called for in the patent. But since it is conceded that the fixed and ascertained corners must govern, and as they could not be connected without departing from the courses given in the field-notes, this contention seems to fail. In my opinion, all the testimony goes to confirm the correctness of the survey of the southwest boundary of the Moro Cojo.

But it is said this does not afford any certain or reliable means of fixing the northeast boundary of the Rincon de las Salinas, because the two tracts of land being on opposite sides of the river, not coterminous, and neither being described by reference to the other, the location of the Moro Cojo does not fix the location of the Rincon de las Salinas.

The force of this objection must be conceded, but it is much diminished by the facts that the field-notes of the river boundaries of the two ranches are connected by a call for a common object,—a township line; that the river is shown to be seven chains in width; that it is not shown to have undergone any changes between the dates of the respective patent surveys; and that there is so close a correspondence between the calls of the meandered lines of the two tracts along the river, that their relative position as surveyed is perfectly demonstrated. There can be little doubt, therefore, that a line projected parallel to the river boundary of the Moro Cojo, and distant seven chains to the southwest, is with reasonable

exactness the original river boundary of the Rincon de las Salinas, and cannot include any land to which the defendants have shown title, or any appreciable quantity of land to which the plaintiffs have not shown title.

Besides, the southeastern corner of the Rincon de las Salinas was, as above stated, established on the ground by actual survey, and connected by actual survey with the southwestern boundary of the Moro Cojo as surveyed; and although no attempt was made to survey the northeastern boundary of the Rincon de las Salinas on the ground, the line of said boundary, as platted on the map of the line surveyed, shows very clearly that it would include a very considerable amount of land that the decree excludes, and would exclude a very trifling quantity that the decree includes, so that the error in the method resorted to for establishing respondents' line, conceding it to have been erroneous, is shown to have been without prejudice, inasmuch as it gives the appellants more land than a correct survey would give them.

It is for this reason, that the error in the method pursued was harmless to appellant, that I think the judgment and order should be affirmed.

SHARPSTEIN, J., concurred in the dissenting opinion of Chief Justice Beatty.

[No. 13078. In Bank.—December 13, 1890.]

JULIA K. DUFF ET AL., RESPONDENTS, v. ROBERT P. DUFF ET AL., APPELLANTS.

APPEAL—REVIEW OF CONFLICTING EVIDENCE.—When the evidence is conflicting, the finding of the court below will not be disturbed.

ID.—REVIEW OF ERRORS—LAW OF CASE—CORRECT RESULTS.—Where a cause has been twice tried, with the same result, and the main questions have become settled as the law of the case by a decision rendered upon a former appeal, and it appears, from the record, that the last trial was full and fair, that a correct result was reached in accordance with the law as decided upon the first appeal, and the evidence is conflicting, the judgment will be affirmed, without a detailed review of errors assigned which could not have affected the result.

APPEAL from a judgment of the Superior Court of Humboldt County, and from an order granting a new trial to respondent upon one issue, and from an order denying a new trial to appellants.

The action was brought by the plaintiffs, Julia K. Duff and Agnes Duff, who are the wife and infant daughter of William R. Duff, deceased, against the defendants, Robert P. Duff and Frank S. Duff, who are the brothers of said decedent, seeking to have the defendants declared trustees of the plaintiff of certain mill property in Eureka, Humboldt County, alleged to have been fraudulently conveyed to the defendants by Richard Duff, the father of defendants and of William R. Duff, under a power of attorney executed to Richard Duff by William R. Duff, in his lifetime, and to compel a conveyance thereof to the plaintiffs, and an accounting of rents and profits. The defendants deny any rights of William R. Duff, and deny all fraud, and plead the statute of limitations. The plaintiffs recovered judgment as prayed for, except as to part of the flour-mill property, concerning the title to which a new trial was granted to the plaintiffs. Defendants' motion for a new trial was denied, and they appeal from the judgment, and from both orders relating to a new

trial. The case was before this court on a former appeal, the decision of which is reported in 71 Cal. 513. The letter referred to in the opinion of the court upon the present appeal is a letter from William R. Duff to his brother Frank S. Duff, one of the defendants, admitting that the mill property in question stood in his name, and that it was understood that his father, Richard Duff, owned one third of it, and his brother Frank S. Duff owned one third of it, and himself one third. The deposition referred to was that of an attorney, taken for the purpose of showing what Frank S. Duff and a Richard Duff had testified to in the year 1866 in the case of Hobbs *v.* Duff, in the superior court of the city and county of San Francisco, in depositions taken in said action, which had been lost from the files of the court, and copies of which, testified to as correct, were produced by the attorney and inserted in his deposition, showing that they each testified in said action that William R. Duff exercised all rights of ownership over the Eureka mill and mill site from 1860 to 1866, and that they, Richard Duff and Frank S. Duff, were merely his agents and servants in relation to the property. This deposition was objected to, upon the ground that the deposition showed an adjournment, by the notary, from one office to another, the stipulation providing that it should be taken at the office of the notary; and that no sufficient foundation had been laid, by proof of loss or destruction of the original record, containing the depositions of Richard Duff and Frank Duff, in the case of Hobbs *v.* Duff, nor by proof that the matters litigated were the same as those involved in this action; and that no admission of Frank S. Duff could bind his co-defendant. The objections to the deposition were overruled. Further facts are stated in the opinion rendered upon the former appeal. (71 Cal. 513.)

S. M. Buck, Horace L. Smith, W. C. Belches, and *John A. McQuaid,* for Appellants.

Wilson & Wilson, S. M. Wilson, J. D. H. Chamberlain, G. W. Hunter, and *W. L. Duff,* for Respondents.

WORKS, J.—This case was heard in Bank, and decided after being twice orally argued and thoroughly and exhaustively briefed. A rehearing was granted, mainly because it was thought that the court below and this court had not given sufficient weight to a certain letter, written by the respondent's intestate, containing certain admissions against his interest. This may have been so as to the court below, but it was not so as to the writer of this opinion, who wrote the opinion upon which the case was decided. In opposition to this admission, which was not by any means conclusive against the author of the letter, was the sworn admission of one of the defendants, at least, as a witness in a former case, to the effect that his brother, the deceased, was the owner of the property. It is true that, in the litigation referred to, it was to the interest of the defendant mentioned to establish the fact that the property was the property of the deceased, and that he may have testified falsely in that case in order to shield the same from the claims of other parties against him and his father; but the court below had the deposition containing these admissions before it, and in connection therewith heard the testimony of the defendant to the contrary in this case, and must have known better than we can know how much weight to give to the testimony of the defendant on both of these occasions, and to the admission contained in the letter above referred to, in the light of such admissions and testimony. Here were opposing admissions by the parties adversely interested. Why should one be considered absolutely conclusive, and the other disregarded? We can see no reason. Nothing more can be said, even if these admissions were the only evidence on the point, than that here was a substantial conflict in the evidence, and this court cannot,

under the well-established rule, disturb the finding of the court below.

For the reasons here given, and those contained in the former opinion, the judgment and orders appealed from are affirmed.

MCFARLAND, J., SHARPSTEIN, J., and PATERSON, J., concurred.

FOX, J., dissenting.—Upon a careful examination of the record in this case upon rehearing, it does not appear to me that the deposition referred to in the foregoing opinion contains a contradiction of the admission made in the letter referred to. I am also satisfied that there was no proper foundation laid for the introduction of said deposition, and that its admission was in violation of the law of the case, as established on the former appeal. (*Duff* v. *Duff*, 71 Cal. 513.) It may be that a different judgment would never be reached in the cause; but for the reason stated, and under the rule established in this particular case on the first appeal, I cannot concur in the foregoing conclusion.

BEATTY, C. J.—I concur in the dissenting opinion of Mr. Justice Fox.

The following is the opinion above referred to, rendered in Bank on the 31st of March, 1890:—

WORKS, J.—A statement of this case will be found in *Duff* v. *Duff*, 71 Cal. 513. It was there held that the complaint stated a cause of action; the law relating to the question of the statute of limitations as applicable to an action of this kind was stated, and the cause was reversed for certain errors of law occurring at the trial. The cause was again tried by the court below, without a jury, and findings and judgment rendered in favor of the plaintiff as to the greater portion of the property in controversy, and in favor of the defendants as to the bal-

ance. A new trial as to the issue found in favor of the plaintiff was denied, and as to that portion of the finding in favor of the defendants a new trial was granted. The defendants appeal from both of these orders, and from the judgment.

It is earnestly contended by the appellants that the findings of the court, and especially those relating to the fraud charged and the statute of limitations, were not sustained by the evidence. We have gone over the evidence, and find it to be such that we cannot disturb the judgment on this ground.

Numerous assignments of errors of law occuring at the trial are assigned and extensively argued in the briefs. We cannot undertake to discuss these alleged errors in detail. They relate mainly to rulings made in the admission and exclusion of evidence. A careful reading of the briefs of counsel and the record has convinced us that no error was committed in any of these rulings that should reverse the judgment. The cause has been twice tried, once by the jury, and once by the court, and decided each time in favor of the plaintiffs. The last trial appears from the record before us to have been a very full and fair investigation of the complicated affairs of this family, so far as it affects the title to this land, and we are satisfied that a correct result was reached.

Judgment and orders affirmed.

SHARPSTEIN, J., MCFARLAND, J., PATERSON, J., FOX, J., and THORNTON, J., concurred.

Rehearing denied.

[No. 13219. In Bank.—December 13, 1890.]

W. G. JONES, RESPONDENT, *v.* J. C. DUCHOW, APPELLANT.

LIBEL—EVIDENCE—RES GESTÆ—CERTIFICATE OF CHARACTER—CONTRADICTION OF WITNESS.—Where a libel is justified on the ground of its truth, and a witness for the defendant has testified that the plaintiff was denounced by himself and all good citizens at the place of his residence, on a certain date, a certificate of recommendation of the plaintiff for good and correct habits in business and social relations, signed by several prominent citizens of that place, at a date four months earlier, is not admissible as part of the *res gestæ*, to contradict the statement of the witness, nor to prove the good character of the plaintiff.

ID.—IMPEACHMENT OF WITNESS—SPECIFIC ACTS—BATTERY.—A witness cannot be impeached by evidence of particular wrongful acts; nor is it proper to ask him, for the purpose of impeachment, whether he had been arrested, pleaded guilty, and paid a fine for beating, bruising and battering a woman of the town.

ID.—OBJECTION TO IMPEACHING EVIDENCE.—An objection to such question, on the ground that it did not tend to impeach the witness, and that the record was the best evidence, is specific enough to invoke the rule which does not permit a witness to be impeached by evidence of particular wrongful acts.

APPEAL from a judgment of the Superior Court of Tuolumne County, and from an order refusing a new trial.

The facts are stated in the opinion rendered in Department Two.

F. D. & G. W. Nicol, F. W. Street, and *E. A. Rodgers,* for Appellant.

It was error to admit the certificate in evidence, none of the signers being produced as witnesses in court, and the certificate not being contemporaneous with the acts alleged, nor part of the *res gestæ*. (Code Civ. Proc., secs. 1826, 2082; Wharton on Evidence, secs. 254–267; *People* v. *Eckman,* 72 Cal. 584; *Aguirre* v. *Alexander,* 58 Cal. 26; *Bush* v. *Roberts,* 111 N. Y. 478; *Louisville R'y Co.* v. *Buck,* 116 Ind. 566; 9 Am. Rep. 883.) The letter, in any view, was inadmissible to contradict Gift. (*Spottiswood*

v. *Weir,* 66 Cal. 528; *Jepsen* v. *Beck,* 78 Cal. 540.) It was *res inter alios acta,* and could not be used for the purpose stated by the court. (*King* v. *La Grange,* 61 Cal. 232.) The witness having been examined by plaintiff on a matter collateral to the issue, plaintiff was bound by his answer thereto, and could not contradict him. (*Pierce* v. *Schaden,* 59 Cal. 540; *Donelly* v. *Curran,* 54 Cal. 282; *People* v. *Mitchell,* 62 Cal. 412; 1 Greenl. Ev., sec. 449.) The letter was incompetent to prove Jones's reputation, which could only be proved by sworn testimony of his general reputation. (*People* v. *Wheeler,* 60 Cal. 581; 44 Am. Rep. 70; *State* v. *Wellington,* 43 Kan. 121.) The certificate was not admissible for any purpose. (*Vicksburg* v. *Meridian R. R. Co.,* 119 U. S. 99.) It was error to allow the witness Bradford to be questioned as to particular wrongful acts, no conviction of a felony being shown. (Code Civ. Proc., sec. 2051; *Hinkle* v. *San Francisco R. R. Co.,* 55 Cal. 627; *People* v. *Hamblin,* 68 Cal. 101; *Sharon* v. *Sharon,* 79 Cal. 633; *People* v. *Elster,* 3 West Coast Rep. 37, and cases there cited.)

James H. Budd, and *I. M. Kalloch,* for Respondents.

The principal fact here in question being the manner of plaintiff's leaving Hollister, whether in secret flight or open departure, and what people there said of him, all such declarations as that in question, whether written or parol, are admissible. (Code Civ. Proc., secs. 1850, 1870, subd. 15; Wharton on Evidence, secs. 258–260; 1 Greenl. Ev., sec. 108; *People* v. *Vernon,* 35 Cal. 51; 95 Am. Dec. 49.) The certificate was admissible, not to show character, but to contradict defendant's testimony as to what was said of plaintiff by citizens of Hollister. (1 Wharton on Evidence, sec. 254; 1 Greenl. Ev., sec. 123.) The specific ground of objection now urged to the examination of Bradford was not urged in the court below, and cannot be raised for the first time on appeal. (*Natoma Water & Min. Co.* v. *Clarkin,* 14 Cal.

548; *People* v. *Moan,* 65 Cal. 536; *Hicks* v. *Lovell,* 64 Cal. 22; 49 Am. Rep. 679; *People* v. *McCauley,* 45 Cal. 148; *Cutter* v. *Caruthers,* 48 Cal. 184; *Henry* v. *R. R. Co.,* 50 Cal. 176.)

THE COURT.—Upon rehearing and further consideration of this case, we are satisfied that the court below did err in the particulars pointed out in the opinion filed herein February 28, 1890, and the same will stand as the opinion and order of the court on this appeal.

BEATTY, C. J., and FOX, J., dissented.

THORNTON, J., concurring.—I concur in the judgment of reversal herein for the reason that the letter allowed in evidence to contradict the witness Gift was erroneously admitted. It was admitted on the offer of plaintiff to contradict a statement of Gift, brought out on cross-examination by plaintiff, which statement was collateral to the issue. The plaintiff was bound by Gift's statement, and could not be allowed to contradict it.

The following is the opinion above referred to, rendered in Department Two on the 28th of February, 1890:—

FOOTE, C.—This is an action for libel. The plaintiff, Jones, recovered, under the verdict of a jury, a judgment for two thousand five hundred dollars, from which, and an order refusing a new trial, the defendant appeals.

One of the grounds of the alleged libel was, that the defendant had published of the plaintiff that he had been compelled to leave his former place of residence between two days, in order to prevent a mob from riding him out of town on a rail.

The defendant admitted the publication of this matter, and justified it on the ground of its truth.

On the trial, Mr. Gift, a witness for the defendant, had testified, among other things, that he had denounced the character of the plaintiff, Jones, at Hollister, his former

place of residence, in this state, "as any other good citizen used to, and did," on account of divers acts of Jones at that place. The plaintiff then proposed to introduce in evidence before the jury a letter or certificate of good character for himself, signed by Judge Breen and others, who are admitted to be good citizens of Hollister.

This was objected to by defendant's counsel, on the ground that it was irrelevant, and incompetent for any purpose. It was admitted in evidence by the court, as "legitimate cross-examination."

The witness then further gave evidence which went to show that the time when this "denunciation" occurred was about July, 1883. The certificate was dated March 2, 1883. It is couched in the following language:—

"SUPERIOR JUDGE'S CHAMBERS, SAN BENITO CO., CAL.
"HOLLISTER, March 2, 1883.

"The bearer of this, Mr. W. G. Jones, contemplates removing from this place, with the view of establishing himself in business in Washington Territory. I take pleasure in commending him to all with whom he may meet in business or social relations. Mr. Jones has for some time past conducted the Hollister Democrat (newspaper), at this place, as the editor and proprietor. I have been well acquainted with him during all of said time, and I bear willing testimony to his uniformly good and correct business habits. He will, I am satisfied, be a gain to any commmunity where he may locate.

"JAMES F. BREEN,
"JUDGE OF THE SUPERIOR COURT OF SAN BENITO COUNTY, CAL.

"WM. T. BROWN, ex-Sheriff.

"I concur in the above.

"T. S. HAWKINS,
"President Bank of Hollister,
"W. C. LANG, Cattle Dealer."

The letter was admitted in evidence, against the defendant's objection, as heretofore stated.

The respondent argues that it was admissible to contradict the statement of Gift, inasmuch as it was part of the *res gestæ;* that it was contemporaneous with and illustrative of the *thing done,* of which Gift spoke, in alluding to the denunciation of Jones by all good citizens at Hollister, at a time when he, Gift, went there to look after a female relative.

The letter is, in itself, merely a certificate of good character for Jones in March, 1883. The state of feeling as to Jones of which Gift spoke appears to have been in July, 1883, some months after the letter was given to him.

The certificate of Judge Breen and others, on March 2, 1883, was not cotemporaneous with the main fact under consideration, which was the denunciation of Jones by all good citizens of Hollister, in July, 1883, the time when Gift went there for a purpose heretofore stated; nor was the certificate illustrative of the condition of public sentiment relative to Jones in July. It was therefore inadmissible as part of the *res gestæ,* to contradict Gift's statement. The effect of its admission would be to prove, on a trial, good character for Jones, at Hollister, by the *ex parte* written statement of witnesses, not under oath or affirmation, and not in the presence and subject to the examination of all the parties to the action who chose to attend. (Code Civ. Proc., sec. 1846.)

The letter was not the testimony of a witness taken either by affidavit, deposition, or by oral examination. (Code Civ. Proc., sec. 2002.) It is clear that it was not admissible to prove good character for the plaintiff, by contradicting what Gift had said of Jones being generally denounced at Hollister in July, 1883. (*People* v. *Eckman,* 72 Cal. 584.)

It is further claimed as error, by the appellant, that the court below overruled his objection to a question asked by plaintiff's counsel of the witness Bradford, which was in this language:—

"Are you the W. F. Bradford who was arrested on the twenty-ninth day of January for beating, bruising, and battering one Maud Evans, a woman of the town, and appeared in Judge Cooper's court, and pleaded guilty, and paid a fine therefor?"

The objection was made on the ground that it did not tend to impeach the witness; that the record was the best evidence. The witness was compelled to answer. "I am."

The court stated that the witness had testified to a very material matter, and the only basis for demanding the answer of the witness must have been to impeach his testimony. We think the ground of objection was specific and clear enough to show that the objecter had in mind and invoked the rule which does not permit a witness to be impeached by evidence of particular wrongful acts theretofore done by him. It was not proposed to show, by his examination, or by the record of his conviction, that he had been convicted of a felony.

"A witness cannot be impeached by evidence of particular wrongful acts, nor is it proper to question the witness with reference to such matters." (Code Civ. Proc., sec. 2051; *Sharon* v. *Sharon,* 79 Cal. 633, and authorities there cited.)

These comprise the main points of objection, as shown by the reply brief of the appellant, and we advise that the judgment and order be reversed.

BELCHER, C. C. and GIBSON, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are reversed.

[No. 13784. Department One.—December 15, 1890.]

H. A. C. McPHAIL, APPELLANT, *v.* A. W. BUELL, RESPONDENT.

BROKER'S COMMISSIONS ON SALE OF REAL ESTATE—ASSUMPSIT—PAROL CONTRACT—QUANTUM MERUIT—STATUTE OF FRAUDS.—To entitle a broker to recover commissions due for the sale of real estate, his contract therefor must be in writing, and no recovery can be had upon a verbal contract or on a *quantum meruit.*

ID.—CONDITIONAL CONTRACT FOR COMMISSIONS—FAILURE OF CONDITION.—Under an agreement by a vendor to pay a broker a commission for selling land when the vendees paid a specified sum on account of the price, and executed their notes and a mortgage for the balance, no recovery can be had for the agreed commission, if the purchasers merely executed their notes and mortgage to the vendor, but never paid the sum required, and on account of their failure to make such payment the vendor was compelled to take back the property.

APPEAL—REVIEW—ERROR WITHOUT PREJUDICE.—Where the record shows that the appellant is not entitled to recover in any event, error in rulings of the court upon the admission of evidence cannot entitle him to a reversal of the judgment.

APPEAL from a judgment of the Superior Court of Santa Barbara County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Cope & Boyce, for Appellant.

B. F. Thomas, for Respondent.

WORKS, J.—The appellant brought this action to recover for commissions alleged to have been due him for making sale of certain real estate for the respondent.

The complaint is in different counts, one upon a special contract agreeing to pay the commissions, and the others relying upon a verbal contract and upon the *quantum meruit.* There could be no recovery on either of the last two counts, because the code of this state requires that, to entitle a broker to recover commissions in this class of cases, his contract therefor must be in

writing. (Civ. Code, sec. 1624; *McCarthy* v. *Loup,* 62 Cal. 302.)

It is equally clear, to our minds, that the appellant was not entitled to recover on the written contract. The agreement was, that the defendant would pay the plaintiff when the vendees paid to him (the defendant) the sum of twenty thousand dollars on account of the price of said sale, and execute to him their notes and mortgage for the balance of the purchase-money. The purchasers executed their notes and mortgage, but failed to pay the sum of twenty thousand dollars, either at the time of making the deed, or upon the notes given afterwards. Although the defendant extended the time of payment, and used all reasonable means to procure the money, he was finally compelled to take back the property. Their failure to pay the money was a complete bar ot any claim of the appellant to commissions.

The appellant contends that certain errors were committed by the court below in its rulings upon the admission of evidence and in its instructions; but conceding this to be so, the case could not be reversed on account of such rulings, as, for the reasons given, the appellant could not recover in any event.

Judgment and order affirmed.

Fox, J., and Paterson, J., concurred.

[No. 20707. Department Two.—December 15, 1890.]

THE PEOPLE, RESPONDENT, *v.* DANIEL BEMMERLY, APPELLANT.

CRIMINAL LAW — HOMICIDE — EVIDENCE — DYING DECLARATION.— Upon the trial of a defendant charged with murder, the dying declaration of the deceased, in order to be admissible in evidence, need not show or state, in terms, that it was made under a sense of impending death, if there is sufficient evidence *aliunde* the written declaration to show that it was so made.

ID.—WRITTEN DECLARATION OF DECEASED—NOTES OF ORAL STATEMENT.—Where notes were taken of what the deceased said, and a statement written out therefrom, which was read to the declarant, sentence by sentence, and the accuracy of each sentence assented to by him, and then signed in the presence of witnesses, the statement becomes his dying declaration, although the written declaration contains some words that were not used by the declarant in his oral statement.

ID.—PRACTICE—CHALLENGE OF JUROR—ACTUAL BIAS—APPEAL—EXCEPTION.—The ruling of the trial court upon the challenge of a juror for actual bias will not be reviewed on appeal, and its disallowance is not the subject of exception.

ID.—PEREMPTORY CHALLENGE.—It is not error to permit the prosecution to peremptorily challenge a juror after he has been sworn, where good reasons are shown therefor.

ID.—INSTRUCTION—REASONABLE DOUBT.—An instruction to the jury defining a reasonable doubt as "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself" is erroneous.

ID.—INDORSEMENT OF INSTRUCTIONS—REVIEW ON APPEAL.—In the absence of an endorsement showing whether a certain instruction was given, it will not be reviewed on appeal.

APPEAL from a judgment of the Superior Court of Yolo County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Craig & Hawkins, Clark & Aram, and *J. E. Strong,* for Appellant.

Attorney-General Johnson, Ed. E. Gaddis, and *C. W. Thomas,* for Respondent.

SHARPSTEIN, J.—Upon the trial of the defendant, upon an information in which he was charged with

murder, a document purporting to be the dying declaration of the deceased was offered in evidence by the prosecution. The defendant objected to its introduction. The objection was overruled, and defendant excepted. The grounds of objection appear to be: 1. The declaration does not show that it was made under a sense of impending death. It commences as follows: "I, Mat Faigle, aged forty-three, and a native of Germany, believing my life to be in great danger, being shot in the left side, above the heart, by a ball from a pistol in the hands of one John Wahlfrom, do now before my God and the undersigned witnesses, make the following true statement believing it to be my last."

Whether the statement, alone, would be sufficient to satisfy the rule that the declaration must be made under a sense of impending death need not be decided in this case, as there was other evidence that it was so made. Professor Greenleaf says: "It is essential to the admissibility of these declarations, and is a preliminary fact, to be proved by the party offering them in evidence, that they were *made under a sense of impending death;* but it is not necessary that they should be stated at the time to be so made. It is enough, if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind." (1 Greenl. Ev., sec. 158.) *Aliunde* the written declaration, there is sufficient evidence that it was made under a sense of impending death. Three or four hours after declarant had received the fatal wound, he was told by his attending physician that he was going to die. And on one occasion decedent told those who were present at his bedside that he knew that he would die, and he

wanted to talk privately with his cousin, who was also present. There is much more evidence of similar import.

Another ground of objection is, that the declaration introduced in evidence is not the one made by the dying man. The manner of taking the declaration, as detailed by Dr. Dillon, by whom it was taken, is as follows: He sat on the side of declarant's bed, and took notes of what declarant said. After taking said notes, witness withdrew to an adjoining room, and from such notes wrote out the statement introduced as a dying declaration. After that was prepared, he returned to the bedside of declarant, and read him each sentence as he went along, and asked him if that was just what he meant, and he said "Yes"; and in that way the whole paper was read to declarant before he signed it. All this occurred in the presence of eight persons, who signed the declaration as witnesses. That this document was not literally copied from the notes taken by Dr. Dillon, he admits. Nor is the language precisely that employed by the declarant in his oral statement to Dr. Dillon. But the doctor testified that he endeavored to give the substance of the statement made to him by the declarant, and he thinks he succeeded, although the written declaration contains some words that were not used by the declarant in his oral statement. However that may be, the declaration introduced in evidence is nevertheless the dying declaration of the declarant. It was read to him, sentence by sentence, and the accuracy of each sentence was assented to by him; and after hearing it all read in that manner, he signed it in the presence of witnesses. It then became his dying declaration. If he made another declaration inconsistent with or contradictory of this, it did not render this inadmissible, but might be urged to the jury as affecting his credibility. Upon the facts disclosed by the record, we think the document which purported to be the dying declaration of Mat Faigle was properly admitted in evidence.

Under repeated decisions of this court, the ruling of the court upon the challenge of the juror H. H. Smith, for actual bias, cannot be remedied here. (*People* v. *Riley,* 65 Cal. 107; *People* v. *Cotta,* 49 Cal. 166; *People* v. *Vasquez,* 49 Cal. 560; *People* v. *Taing,* 53 Cal. 602.)

No exception can be taken to the disallowance of a challenge to a juror for actual bias. (Pen. Code, sec. 1170.)

It was not error to permit the prosecution to peremptorily challenge the juror Hall after he had been sworn, good reasons being shown therefor. (Pen. Code, sec. 1068; *People* v. *Montgomery,* 53 Cal. 576.)

Instruction No. 10, given at the request of the prosecution, gives a lengthy definition of "a reasonable doubt," and contains this clause: "It must not be one that is merely fanciful,—created ingeniously in your minds, to escape the consequences of an unpleasant verdict; it must be an honest doubt,—such a doubt as strikes the conscientious mind, and one that clouds the understanding of those who are honestly seeking to arrive at the truth; *such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself.*" In *People* v. *Brannon,* 47 Cal. 96, "the jury were told that it was their duty to convict if they should be satisfied of the guilt of the defendant to such a moral certainty as would influence the minds of a jury in the important affairs of life." This was held to be error. The court said: "The judgment of reasonable men in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence. Juries are permitted and instructed to apply the same rule to the determination of civil actions involving rights of property only. But in the decision of criminal cases, involving life or liberty, something further is required. There must be more than a preponderance of evidence. There must be in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, derived from a

comparison and consideration of the evidence. They must be entirely satisfied of the guilt of the accused."

In *People* v. *Ah Sing*, 51 Cal. 372, "the court below, after instructing the jury that the defendants on trial upon an indictment for murder are presumed to be innocent until proven guilty beyond a reasonable doubt, proceeded as follows: 'A reasonable doubt is that state of a case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot feel an abiding conviction, to a moral certainty, of the truth of the charge. The doubt must not be vague and shadowy. Absolute certainty is rarely attainable, and is never required. *If the evidence is such that a man of prudence would act upon it in his own affairs of the greatest importance, then there cannot remain a reasonable doubt within the meaning of the law.*' The defendants excepted to so much of the instruction as is Italicized."

The court said it is certainly a mistake to say that there cannot remain a reasonable doubt when even the evidence is such "that *a man of prudence would act upon it in his own affairs of the greatest importance.*" Upon the authority of these cases, we are bound to hold that so much of the instruction in this case as we have Italicized is erroneous.

Instruction No. 4 is not erroneous.

There is no indorsement showing whether instruction No. 24 was given, and in the absence of such indorsement, we cannot review it.

We fail to discover anything in the other points discussed by counsel that requires consideration here. But the errors which we have pointed out require that the judgment and order be reversed.

Judgment and order reversed, and cause remanded for a new trial.

THORNTON, J., and MCFARLAND, J., concurred.

Hearing in Bank denied.

[No. 20713. In Bank.—December 15, 1890.]

THE PEOPLE, RESPONDENT, *v.* ANTONIO PEREZ, APPELLANT.

CRIMINAL LAW—INFORMATION—DEMURRER.—A demurrer to an information is properly overruled when it would remain sufficient under the statute if the part excepted to should be stricken out.

ID.—GRAND LARCENY—VERDICT.—Upon an information for grand larceny, a verdict of "guilty as charged" is a conviction of grand larceny.

ID.—ARRAIGNMENT FOR JUDGMENT — JUDGMENT — PUNISHMENT FOR GRAND LARCENY.—Where the judgment roll shows a full compliance with the requirements of section 1200 of the Penal Code at the time of arraignment for judgment, and the judgment, upon conviction for grand larceny committed in the city and county of San Francisco, is, that the defendant be punished for the crime of which he was charged and convicted, by imprisonment in the state prison of the state of California at San Quentin for the term of nine years, the judgment is sufficient under the statute.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The information accused the defendant of the crime of grand larceny in feloniously stealing, taking, and carrying away certain articles specifically described, stating the value of each, which amounted in the aggregate to $630; "also, various other articles, of the value of eight hundred and ninety dollars in lawful money of the United States,"—all described as the personal property of one Martha Cooper. The defendant demurred to the information, and objected that the portion above quoted stated no offense, and did not conform to the requirements of sections 950, 951, and 952 of the Penal Code. The record of the sentence is as follows: "This being the day set for sentence, the defendant and counsel being asked if he had any legal cause to show why judgment should not be pronounced against him. To which defendant moves for a new trial. Motion denied. Defendant excepts. Thereupon the court renders its judgment: That whereas the said Antonio Perez having

been duly convicted of the crime of grand larceny, it is therefore ordered, adjudged, and decreed that the said Antonio Perez be punished by imprisonment in the state prison at San Quentin for the term of nine (9) years."

Carroll Cook, and *J. E. Foulds,* for Appellant.

Attorney-General Johnson, for Respondent.

Fox, J.—1. The demurrer to the information was properly overruled. All that part of it to which exception is taken may be stricken out, and it still remains a good information under the statute. The presence of the language excepted to does not prejudice the defendant, or affect the validity of the information.

2. The information is for grand larceny, and a verdict of "guilty as charged" is a conviction of grand larceny. (*People* v. *Whitely,* 64 Cal. 211; *People* v. *Price,* 67 Cal. 350.)

3. The judgment roll shows a full compliance with the requirements of section 1200 of the Penal Code at the time of the arraignment for judgment.

4. The information was for and the conviction was of grand larceny committed in the city and county of San Francisco. The judgment of the court was, that for the crime of which he was so charged, and for which he had been so convicted, it is "ordered, adjudged, and decreed that the said Antonio Perez be punished by imprisonment in the state prison of the state of California at San Quentin for the term of nine (9) years." This was sufficient under the statute. Judgment affirmed.

SHARPSTEIN, J., MCFARLAND, J., PATERSON, J., and THORNTON, J., concurred.

[No. 12271. In Bank.—December 15, 1890.]

JAMES McGIVNEY, APPELLANT, *v.* JOHN H. PIERCE, RESPONDENT.

ELECTION CONTEST — JURISDICTION OF SUPERIOR COURT — COMMON COUNCIL OF OAKLAND—REPEAL OF MUNICIPAL CHARTER.—The provision of the charter of the city of Oakland enacted in March, 1854, giving the common council exclusive jurisdiction to hear and determine an election contest for the office of councilman of the city council is repealed by sections 1111 et seq. of the Code of Civil Procedure, providing for the determination of such a contest by the superior court.

STATUTE—REPEAL BY IMPLICATION.—Whether a general statute repeals a special one by implication is a question of intention, to be gathered from the language used, and from the subject-matter of legislation.

APPEAL from a judgment of the Superior Court of Alameda County.

The facts are stated in the opinion of the court.

Clunie & Young, for Appellant.

Metcalf & Metcalf, for Respondent.

McFARLAND, J.—The appellant inaugurated a contest in the superior court of Alameda County for the office of councilman of the city council of Oakland, under sections 1111 et seq. of the Code of Civil Procedure. The respondent demurred, upon the ground of want of jurisdiction; and the court sustained the demurrer, and entered judgment dismissing the contest. From said judgment this appeal is taken.

The judgment was rendered upon the ground that the act reincorporating the city of Oakland, which was enacted in March, 1854, gave to the common council of Oakland exclusive jurisdiction to hear and determine an election contest such as is involved in this proceeding. Waiving the question whether the language of the charter is broad enough to include the subject-matter of the present litigation, and waiving the constitutional question as to the authority of the legislature to grant such judicial power to the common council, it is clear, to our

minds, that the sections of the code above referred to, which were enacted long after the charter, necessarily repeal the provision of the charter here invoked. Section 1111 provides that "any elector of a county, city and county, city, or of any political subdivision of either, may contest the right of any person declared elected to *an office to be exercised therein* for any of the following causes." Then follows an enumeration of various grounds of contest, including those set up in the complaint or statement in this case. The succeeding sections provide that an elector wishing to institute such a contest must file with the county clerk a written statement setting forth certain specifications of grounds of contest; that the clerk must inform the superior court of the filing of such statement; that the court must call a special session at a certain time at the court-house to hear the contest; that a citation must be issued, etc., and that "the court must meet at the time and place designated, to determine such contested election, and shall have all the powers necessary to the determination thereof." It is further provided that "the court must pronounce judgment in the premises, either confirming or annulling and setting aside such election."

Of course a general statute does not always, by implication, repeal a special one. It is always a question of intention, to be gathered from the language used, and from the subject-matter of the legislation. With respect to the matter before us, we think that the legislature, when enacting the sections of the code above mentioned, clearly intended to adopt a uniform rule for all election contests about the officers named in section 1111, and necessarily repealed all former statutes inconsistent with that intention.

The judgment appealed from is reversed, with instructions to the trial court to overrule the demurrer.

Thornton, J., Fox, J., Paterson, J., and Beatty, C. J., concurred.

[No. 12609. In Bank.—December 15, 1890.]

J. H. FLICKINGER, RESPONDENT, *v.* ISAIAH SHAW ET AL., APPELLANTS.

EASEMENT—RIGHT OF WAY FOR IRRIGATING DITCH—CONTRACT OF SALE—LICENSE—REVOCATION.—Where the plaintiff and his assignor entered into a parol agreement with defendant, by the terms of which they were to receive a conveyance of a right of way for an irrigating ditch over defendant's land, and of one half of the water to be diverted thereby, the plaintiff and his assignor to survey and excavate the ditch and keep it in repair, and the ditch, when completed, to be used for the equal benefit of both the contracting parties for the purpose of irrigation, and the ditch was constructed and kept in repair by the plaintiff and his assignor, and used by both parties, the agreement is essentially one of purchase and sale, and the defendant will not be allowed to treat the transaction as a mere parol license which he may revoke after the work has been done and money expended by the other parties under the contract.

ID.—SPECIFIC PERFORMANCE — ORAL AGREEMENT FOR EASEMENT—PART PERFORMANCE—STATUTE OF FRAUDS.—Equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be an inadequate remedy; and where there has been such a part performance of an oral agreement for an easement upon land that it would be sanctioning fraud to refuse its specific performance, the statute of frauds does not prevent an enforcement of the agreement.

ID.—EXECUTED LICENSE—EXPENDITURE BY LICENSEE—REVOCATION—TRUST EX MALEFICIO.—An executed license may become an agreement for a valuable consideration, and where the revocation of the license would operate as a fraud upon the licensee, who has expended money and made improvements upon the faith of it, equity will hold the owner of the land as a trustee *ex maleficio* to prevent such revocation.

ID.—RIGHT OF WAY—EQUITABLE TITLE—INJUNCTION.—Where nothing remains to be done to complete such contract except the execution of a conveyance to the plaintiff of the right of way for the irrigating ditch, and of a proper proportion of the water diverted thereby, the plaintiff has a perfect equitable title in the ditch and water, which equity will protect by injunction, as readily and fully as it would protect the legal title.

APPEAL from a judgment of the Superior Court of Santa Clara County.

The action was brought to obtain a judgment that plaintiff is the owner of a ditch, and the right of way therefor, over the lands of the defendant Isaiah Shaw;

and the owner of the use of eleven hundred inches of the water of Penetencia Creek, in Santa Clara County, to be used through said ditch, measured under a four-inch pressure; and that plaintiff is the owner of all the waters of Penetencia Creek, after supplying said ditch to the extent of four thousand inches of water under a four-inch pressure, to be used through a second ditch, located on plaintiff's land below the land of defendant Shaw; and to enjoin interference with the flow of water into said ditches, or either of them. The court finds the following facts: The plaintiff, J. H. Flickinger, and one C. Smith, were the owners of a tract of land of seventy-four acres bounded upon the northeast by a tract owned by the defendant Isaiah Shaw. Penetencia Creek flowed as a natural stream along the eastern boundary of the land owned by Shaw. In November, 1880, it was orally agreed between Shaw and Flickinger and Smith that Flickinger and Smith should at their individual expense survey, excavate, and keep in repair a ditch by which the waters should be diverted from said creek, and by which they could be used for irrigating alike the land of Shaw and that of Flickinger and Smith; Shaw to have the use of one half of the water so diverted, and that Flickinger and Smith should have the other half, and the right of way over the land of Shaw for the ditch, and one half of the water to be diverted thereby. On the 27th of December, 1880, the survey was made, and the ditch located to conform to Shaw's requests, and was so constructed as to convey all the waters usually running in the creek for the equal use of Shaw and of Flickinger and Smith, at an original cost of about four hundred dollars to Flickinger and Smith, and at a further cost to them of two hundred dollars for keeping it in repair. The capacity of the ditch was increased by them so as to finally carry eleven hundred inches of water. The ditch was used jointly according to the agreement until December 25, 1885.

After its completion, it was agreed that the waters should be appropriated by posting a notice, and that Shaw should convey to Flickinger and Smith a conveyance of one half thereof, and of the right of way over his land; but Shaw posted the notice in his own name in December, 1881, and never conveyed to Flickinger and Smith. Before December, 1885, the plaintiff, Flickinger, acquired all the rights of C. Smith in the ditch and water right, and also acquired from defendant Shaw a tract of land fronting on the creek, below the head of the ditch, and Shaw then conveyed to Flickinger a right of way across his land for a ditch leading to the tract so conveyed; and in October, 1885, Flickinger posted a notice claiming four thousand inches of the water of the creek to be conveyed to the lands so purchased from Shaw, and other lands not included in the tract originally owned by Flickinger and Smith, and constructed another ditch to said lands, which was not intended as a substitute for the ditch originally constructed under the agreement, but for the purpose of utilizing what water might at any time flow down the creek in excess of the capacity of the upper ditch. In December, 1885, Shaw fitted up the ditch by which the water had been conveyed to the land of Flickinger and Smith, and enlarged the capacity of the upper ditch on his own land to two thousand inches, and denied the right of plaintiff to any of the water so appropriated. The court decreed that plaintiff is entitled to the flow of eleven hundred inches of water through the upper ditch as originally constructed to the lands of Flickinger and Smith, to be equally divided between plaintiffs and defendant, and that plaintiff is the owner of one half of the ditch, and is entitled to maintain it in repair, and is entitled to all the surplus water of the creek above eleven hundred inches to the extent of four thousand inches, and enjoined the interference by defendant with the rights of the plaintiff. The further facts are stated in the opinion of the court.

T. H. Laine, and *Richards & Welch,* for Appellants.

The estate claimed by Flickinger is an easement and estate in real property, or a servitude. (Civ. Code, secs. 801–811; Washburn on Easements and Servitudes, 3d ed., 3.) No easement can be created or transferred except by operation of law or instrument in writing. (Civ. Code, sec. 1091; Code Civ. Proc., secs. 1971, 1973, subd. 5; Bennett's Goddard on Easements, 3, 4, 87, 88–94, 283, 284; *Emerson* v. *Bergin,* 76 Cal. 201.) A parol agreement for an easement is a mere license, revocable at pleasure of the licensor. (Goddard on Easements, 472–475; *Morse* v. *Copeland,* 2 Gray, 302.) The only interest which Flickinger ever had or acquired in the ditch, or in the water flowing therein, was that of a mere licensee, exercising from year to year a license revocable at any time by Shaw. (Washburn on Easements, 3d ed., 398; *Barbour* v. *Pierce,* 42 Cal. 657; *Hihn* v. *Spreckels,* 59 Cal. 315; *Haven* v. *Seeley,* 59 Cal. 494; *Emerson* v. *Bergin,* 71 Cal. 335.) The license is revocable, even though the licensee has made extensive improvements under his license. (See Goddard on Easements, 472, 473, and cases cited; *Houston* v. *Laffes,* 40 N. H. 505; *Mason* v. *Holt,* 1 Allen 45.) The rule sometimes laid down in the books, that a license executed cannot be countermanded, is not applicable to licenses which, if given by deed, would create an easement, but only to licenses which, if given by deed, would extinguish or modify an easement. (Goddard on Easements, 472, and cases cited.)

J. C. Black, for Respondent.

A parol agreement of an interest in land may be specifically enforced when partly performed. (Civ. Code, sec. 1741.) Rights under an oral contract, acquired by possession, and improvements of a permanent character, cannot be ignored, where irreparable injury and positive fraud would be the result. (*McCarger* v. *Rood,* 47 Cal.

138; *Clark* v. *Clark,* 49 Cal. 586; *Manly* v. *Howlett,* 55 Cal. 94; *Karns* v. *Olney,* 80 Cal. 100; 13 Am. St. Rep. 101; *Freeman* v. *Freeman,* 43 N. Y. 38; 3 Am. Rep. 657; *Robbins* v. *Robbins,* 89 N. Y. 253.) The rights acquired by respondent are such that compensation in damages cannot be made, and none are offered. If a license, it is of such nature and so mutually acted upon as to be irrevocable. (Sec 7 Wait's Action and Defenses, p. 208, sec. 8, and authorities cited; *Parke* v. *Kilham,* 8 Cal. 79, 80; 68 Am. Dec. 310; *Bowman* v. *Cudworth,* 31 Cal. 153; *Davis* v. *Davis,* 26 Cal. 39; 85 Am. Dec. 157.)

THORNTON, J.—That the object to be attained by the agreement between Flickinger and Smith on the one hand, and the defendant (Shaw) on the other, was to acquire by purchase a right of way over the land of the latter for the ditch constructed by the first-named parties is, in our judgment, a fair legal deduction from the facts disclosed in this case. Flickinger and Smith were seeking to acquire something more than a mere license or authority to do a particular act or series of acts on another's land without possessing any estate therein (*Potter* v. *Mercer,* 53 Cal. 673), and which right might at any time be revoked by the licensor.

In this case, the agreement between the parties is, in substance, that Shaw gives the right of way for a ditch over his land; that Flickinger and Smith survey and excavate the ditch, and keep it in repair, and the ditch, when completed, to be used for the benefit of all the contracting parties in irrigating their respective tracts of land. Let it be observed (and it is so found) that Shaw agreed that Flickinger and Smith should have a conveyance of and give a right of way over his land for the ditch, and one half of the water to be diverted thereby.

The above facts clothe the transaction with the character of a purchase by one party, and sale by the other, of a right of way for a ditch. The license under which

Flickinger and Smith entered was vested in them by a contract of purchase for a valuable consideration.

Under this agreement, Flickinger and Smith did survey and construct the ditch and kept it in repair, and both parties made use of it for the purpose for which it was constructed, viz., the irrigation of their lands. Thus the agreement between the parties was executed. The license here given to Flickinger and Smith was one for the acquisition of an interest in land by purchase of Shaw, for which they paid by doing what they had agreed to do. After the ditch was constructed, it was used by all parties under the agreement for four or five years.

Now, it would be highly inequitable, after the work has been done and money expended by Flickinger and Smith, to allow Shaw to recall his consent, fill the ditch, and cut Flickinger, who has succeeded to all the rights of Smith under the agreement above stated, off from the use of the ditch and the water flowing therein; nor should any such proceeding, in our view, be upheld by a court of justice.

In *Rerick* v. *Kern,* 14 Serg. & R. 271, 16 Am. Dec. 497, a case in some respect similar to the one under consideration, came before the supreme court of Pennsylvania. The case was one concerning the legal effect of an executed license. It was an action on the case to recover damages for diverting a watercourse, by which the plaintiff lost the use of his saw-mill. The facts were as follows: Kern, the plaintiff below, being about to erect a saw-mill on a stream designated as the right-hand stream, a better seat for the mill was found by his mill-wright, on what was termed the left-hand stream. Kern thereupon applied to Rerick for permission to turn the water of the other stream into the left-hand stream, which was granted. In consequence of this permission, Kern built the mill on the left-hand stream. The mill was rendered a third more valuable by the union of the two streams than it

would have been with the right-hand stream alone. No deed was executed, nor was any consideration given, but Kern, in consequence of the permission given by Rerick, built a very good mill, which did a great deal of business, and which he would not have built on the left-hand stream if the permission had not been given.

In this case, as will be observed, there was no element of purchase.

The defense set up was, that the permission to Kern was a mere license which was revocable under all circumstances and at any time. To this it was said, in the unanimous opinion of the court, by Gibson, J.: "But a license may become an agreement on valuable consideration, as where the employment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not such an agreement be decreed in specie? That a party should be let off from his contract, on payment of a compensation in damages, is consistent with no system of morals but the common law, which was in this respect originally determined by political considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior should not be prevented by want of personal independence. Hence the judgment of a court of law operated on the right of a party, and the decree of a court of equity on the person. But the reason of this distinction has long ceased, and equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be an inadequate remedy."

The same rule has been applied in case of an executed license in *Pope* v. *Henry,* 24 Vt. 565, and also in *Swartz* v. *Swartz,* 4 Pa. St. 358; 45 Am. Dec. 697.

The principle on which these cases proceed is, as was said in *Swartz* v. *Swartz,* 4 Pa. St. 358, 45 Am. Dec. 697, "that the revocation would be a fraud; and that to prevent it a chancellor would turn the owner of the soil into a trustee *ex maleficio.*" The case under consideration presents a stronger ground of relief then either of these above cited.

Principle and authority, in our judgment, show that the plaintiff has rights here which should be protected by injunction. The facts show plaintiff's right to a specific performance. The statute of frauds is not in the way. There has been part performance, and possession under the agreement, as far as the plaintiff could obtain possession, and though the agreement rests in parol, under the circumstances above mentioned, a party is entitled to a specific performance. (*Rerick* v. *Kern,* 14 Serg. & R. 272; 16 Am. Dec. 497.) To refuse specific performance under the circumstances would be to sanction fraud, and to allow a statute passed for the prevention of fraud to become the means of accomplishing a fraud.

To complete the purchase, nothing remains to be done except the execution of a conveyance of the right of way and a proper proportion of the water to Flickinger. His equity to a deed is perfect (*Morrison* v. *Wilson,* 13 Cal. 494; 73 Am. Dec. 593); and when such is the case, a court of equity, in accordance with its familiar rules considering that as done which ought to be done, will protect it as readily and as fully as a legal title. If the legal title would be protected by an injunction, a perfect equitable title should also.

In conformity with these views, in our opinion the judgment should be affirmed.

BEATTY, C. J., FOX, J., and PATERSON, J., concurred.

McFARLAND, J., dissented.

Rehearing denied.

[No. 12759. In Bank.—December 15, 1890.]

JOHN H. McMENOMY, RESPONDENT, *v.* FRANK BAUD, APPELLANT.

NUISANCE — BRASS-FOUNDRY — PROOF REQUIRED.—A brass-foundry and machinery incident thereto are not *prima facie* nuisances, and one complaining of them must allege and prove that they are such by reason of their peculiar location or the improper or negligent manner in which they are conducted.

ID.—QUALIFIED INJUNCTION.—Where the injurious effects complained of as resulting from the running of a foundry and machinery may be prevented without entirely abating or enjoining the works or the operations thereof, only the causes of the specific injurious effects proved should be enjoined, leaving the defendant at liberty to operate his works, if he can, and elects to do so, in such a manner as to remove the cause and prevent the injury.

ID.—REVIEW ON APPEAL — FINDINGS CONTRARY TO EVIDENCE — REVERSAL OF JUDGMENT—MODIFICATION OF INJUNCTION.—Where, on account of exaggerated findings of fact not justified by the evidence, the extent of the relief by injunction to which the plaintiff is entitled against the improper operation of the foundry cannot be finally determined on the appeal, a judgment totally enjoining the operation of the foundry will be reversed, and not modified.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

John D'Arcy, and *Otto tum Suden,* for Appellant.

Clunie & Young, for Respondent.

The COURT.—The plaintiff and defendant are coterminous owners of lots of 27½ feet front on Fulton Street, in San Francisco, and running back 120 feet, to Ash

Avenue. Each, with his family, resided on his lot, there being an open space of only five to six inches between their houses. The defendant operated a small brass-foundry on the first or ground floor of his house, with machinery incidental thereto, propelled by a small steam-engine having a cylinder of six inches diameter and seven inches stroke. The principal machinery consisted of turning-lathes for turning and polishing brass. The objects of this suit are to enjoin the operating and use of the foundry and machinery, on the ground that they are a nuisance to plaintiff, and to recover two thousand dollars damages. The allegations of the complaint in regard to the nuisance are as follows:—

"3. That defendant has erected and maintained on his said premises, and used and operated for the two years last past, in the same place, and in close proximity to the above-described premises of plaintiff, a steam-engine and boiler, and lathe, and the machinery of a brass-foundry, and still maintains, uses, and operates the same, and threatens to continue to do the same; that he has operated and used, and operates and uses, and threatens to operate and use, the same, in such a manner as to disturb and annoy this plaintiff and this plaintiff's family, and to endanger the safety and health of this plaintiff and this plaintiff's family, and to offend the senses of this plaintiff and his family.

"4. That the presence and proximity of said machinery, and its operation and use by defendant, has greatly injured and damaged plaintiff, in this: that defendant has used said machinery, and operated the same, for the last two years, continuously, night and day, and on Sundays, and at all times, and still so uses, and threatens to and will so use it, unless restrained by this court; that said machinery constantly produces intolerable noise, which deprives plaintiff and his family of all rest and enjoyment, and has produced such effect for two years last past, and has rendered the life of this plaintiff and

that of his family miserable; that by the jarring thereof said building of plaintiff has been shaken and unsettled, and the walls and plaster thereof broken and cracked; that defendant has employed, and still employs, and threatens to employ, unskilled employees in and about said machinery, and thereby has endangered, and will endanger, the safety of this plaintiff and this plaintiff's family, and thereby keeps them in peril of their lives, and will so keep them; that thereby the value of this plaintiff's said property has been and is become greatly impaired in value, and this plaintiff is and will be unable to rent the same, and will be compelled to abandon the same, unless defendant be restrained from operating the same machinery."

The answer denies that the operating of the foundry and machinery is or ever was a nuisance; and denies all averments tending to prove the nuisance.

As to the alleged nuisance and damage, the court found the following facts:—

"That during all said times he, said defendant, used, operated, and maintained the same said foundry, and machinery, engine, and boiler, in such a manner as to disturb and annoy the plaintiff and his family, and to endanger the safety and health, and to offend the senses, of the plaintiff and his family.

"4. That the presence and proximity of said machinery, and its operation and use by defendant, as aforesaid, greatly injured and damaged plaintiff and his property; that the defendant, during all of said two years next before the commencement of this action, used and operated said engine, boiler, and machinery at unusual and unseasonable hours, night and day, and on Sundays, and that such use and operations caused intolerable noise, produced offensive fumes, smells, smoke, and soot, which extended to and within the said premises of plaintiff; that by the jarring caused by the operation of said machinery and engines, the said building of plain-

tiff was continuously shaken and unsettled, the walls and plastering therein broken and cracked, and said house rendered unsafe as a dwelling, and thereby greatly endangered the lives and safety of the plaintiff and his family; that on account of all thereof, the said property of plaintiff has been greatly impaired and depreciated in value, and the life and existence of plaintiff and his family rendered uncomfortable and miserable, and their health impaired.

"5. That by reason of the premises, plaintiff has been damaged in the sum of two thousand dollars.

"6. That the maintenance of said foundry, and the use and operation of said engine, boiler, and machinery, is, and during all of said times has been, a nuisance on said premises of defendant, and to said plaintiff and his family, upon plaintiff's said premises.

"7. That the said location of said foundry is in a residence portion of the said city of San Francisco, and is an unsuitable place for the location of such works."

As a condition of denying defendant's motion for new trial, the damages were reduced to twelve hundred dollars.

The judgment perpetually enjoins the defendant "from erecting, maintaining, having, keeping, or operating on said premises of defendant, described in the pleadings and records herein, said brass-foundry and machine-shop, boiler and engine, or any foundry or machine-shop, boiler or engine, causing noises, smoke, or other effluvium, injurious to health, offensive to the senses, or an obstruction to the free use of plaintiff's property described herein." And further orders and decrees that a permanent injunction issue to defendant and his servants and employees, "requiring him and them, and each of them, to perpetually refrain from having, maintaining, operating, or continuing the use of said brass-foundry and machine-shop, boiler and engine, or either thereof, on the said premises of defendant, and requir-

ing him and them, and each of them, to perpetually refrain from having, erecting, maintaining, or operating any brass-foundry, or foundry or machine-shop, boiler or engine, thereon, causing noises, smoke, or other effluvium, injurious to health, offensive to the senses, or an obstruction to the free use of plaintiff's property described herein, and that said nuisance now maintained on said premises of defendant be abated."

The defendant has appealed from the judgment, and from an order denying his motion for a new trial; and his counsel here contend that the evidence is insufficient to justify the findings, and that the findings do not support the judgment.

1. As to the effect of the running of the foundry and machinery upon the plaintiff and his family and his property, the evidence is extremely conflicting. On the part of the plaintiff it tends to prove that the defendant operated the foundry and machinery in such a manner as to offend the senses of the plaintiff and his family, and to interfere with the comfortable enjoyment of their residence. To this extent, the findings are justified by the evidence, notwithstanding the conflict, and entitle the plaintiff to an adequate remedy by injunction. But so far as the findings exceed this, we think they are not justified by the evidence. The evidence does not justify the findings that the noise was "intolerable," that said building of plaintiff was "continuously" shaken and unsettled, that said house was rendered "unsafe" as a dwelling, that the *lives* of the plaintiff and his family were "endangered" or rendered "miserable," or that their health was "impaired."

The points to which the evidence was directed were annoyances,—1. By smoke and soot; 2. By noise and jarring of machinery; 3. By noisome smells; and 4. By obstruction of sidewalk.

There is no finding, and no evidence to justify a finding, that either of these causes of annoyance and injury

to plaintiff was necessarily incident to the proper operation of the foundry or machinery complained of. Indeed, the evidence tends to prove that the injurious effects may be remedied without enjoining the running of the foundry or machinery, and that it was only the improper and negligent manner of running them that caused the injurious effects upon the plaintiff and his property. It is said that the smoke-stack and the steam-escape pipe are too low, that the boiler and engine are not properly set, and that the fuel is not such as should be used. There is no pretense that the "dipping" of brass castings in diluted acids, *upon the sidewalk,* was necessary, or that such dippings might not be done at some other place, from which the fumes would not reach plaintiff's house; nor that the improper obstruction of the sidewalk was necessary to the proper operation of the foundry or machinery.

A brass-foundry and machinery incident thereto are not *prima facie* nuisances; and a plaintiff who complains of them must allege and prove that they are such by reason of their peculiar location or the improper or negligent manner in which they are conducted. Therefore, where the injurious effects complained of may be prevented without abating or enjoining the works or the operations thereof entirely, only the causes of the specific injurious effects proved should be enjoined. If, for example, the cause be the production and escape of smoke and soot in such a way as that they penetrate plaintiff's premises, to his injury, the remedy by injunction should be restricted to this specific injury, and leave the defendant at liberty to operate his works, if he can, and elects to do so, in such a manner as to remove the cause and prevent the injury. (*Tuebner* v. *Cal. St. R. R. Co.,* 66 Cal. 171; *Sullivan* v. *Royer,* 72 Cal. 248; 1 Am. St. Rep. 51; Cooley on Torts, 2d ed., 714 et seq.; Wood on Nuisances, secs. 144, 151, 556, 559, 565; *Carson* v. *Central R. R. Co.,* 35 Cal. 332; *Brown* v. *Kentfield,* 50 Cal. 129.)

The first part of the injunction in this case restrains the defendant from operating the foundry or machinery complained of, in any manner, or at all; and the second part restrains him from operating "*any* foundry or machinery shop, boiler or engine, causing noises, smoke, or other effluvium, injurious to health, offensive to the senses, or an obstruction to the free use of plaintiff's property described herein." Even this last part is too general. It is not confined to such noises, smoke, and effluvium as shall be injurious to the health or offensive to the senses of the *plaintiff*, or to the occupants of *his property*.

That the injunction should be modified is apparent; but on account of the exaggerated findings of fact not justified by the evidence, the extent of the modification cannot be determined here.

The judgment and order are therefore reversed, and the cause remanded for a new trial.

WORKS, J., dissented.

[No. 14038. In Bank.—December 15, 1890.]

HENRY J. CRALL, APPELLANT, *v.* BOARD OF DIRECTORS OF POSO IRRIGATION DISTRICT, RESPONDENT.

IRRIGATION DISTRICTS—WRIGHT ACT—CONSTITUTIONAL LAW—CORPORATION.—The Wright act (Stats 1887, p. 29), providing for the organization of irrigation districts, is constitutional, and the districts organized under its provisions are public corporations.

ID.—CONFIRMATION OF ORGANIZATION—PROCEEDINGS IN REM—STATUS OF DISTRICT—POWER TO ISSUE BONDS.—A special proceeding by the directors of an irrigation district, brought under the act supplemental to the Wright act (Stats. 1889, p. 212) providing for special proceedings in the superior court for the confirmation of the organization of the district and of the issue and sale of bonds, is in the nature of a proceeding *in rem* to determine the *status* of the district, and its power to issue valid bonds.

Id.—Constructive Service of Process—Jurisdiction—Res Adjudicata.—In such proceeding, constructive service of process by publication and posting, as prescribed by the Wright act, is sufficient to give the court jurisdiction of the subject-matter and of the parties, and its judgment is valid and binding as against them and all the world, upon all questions involved in the case, until reversed on appeal, or set aside by some direct proceeding instituted for that purpose.

Id.—Injunction—Sale of Bonds—Defects in Organization—Plea in Bar.—Such judgment is a valid plea in bar to an action to enjoin the sale of bonds of the irrigation district, brought by a party constructively served with process in the proceeding *in rem*, and no alleged defects in the organization of the district can be reviewed in the injunction suit.

Appeal from a judgment of the Superior Court of Stanislaus County.

The facts are stated in the opinion.

L. J. Maddux, for Appellant.

A petition conforming to the provisions of the Wright act is essential to the exercise of any jurisdiction in that matter, and such jurisdiction could not be exercised by the board unless the petition was true. (*Mulligan* v. *Smith,* 59 Cal. 206; *Liebman* v. *City,* 11 Saw. 147; *Ziegler* v. *Hopkins,* 117 U. S. 683.) Personal service of process was essential to jurisdiction over the person of the plaintiff, in order to debar him of his defenses to the proceedings for confirmation. (*Pennoyer* v. *Neff,* 95 U. S. 714; *Stuart* v. *Palmer,* 74 N. Y. 191; 30 Am. Rep. 289; *Taylor* v. *Porter,* 4 Hill, 146; 40 Am. Dec. 274; *Westervelt* v. *Gregg,* 12 N. Y. 209; 62 Am. Dec. 160; *Powell's Appeal,* 29 Mich. 376; *State* v. *Fond du Lac,* 42 Wis. 298.)

Wright & Hazen, and *A. L. Rhodes,* for Respondent.

The confirmation act gives the superior court jurisdiction of all the proceedings in respect to organization of the irrigation district, and differs materially from the act referred to in *Mulligan* v. *Smith,* 59 Cal. 206. The act could constitutionally give such jurisdiction. (*Lent* v. *Tillson,* 72 Cal. 404.) The court acquired jurisdiction

of the plaintiff in this case, constructive service of notice being sufficient to sustain the jurisdiction. (*Davidson* v. *New Orleans,* 96 U. S. 104; *Riley* v. *Lancaster,* 39 Cal. 354; *Eitel* v. *Foote,* 39 Cal. 440; *Mayo* v. *Foley,* 40 Cal. 282; *State* v. *McGlynn,* 20 Cal. 233; 81 Am. Dec. 118; *Irwin* v. *Scriber,* 18 Cal. 499; *Boyd* v. *Blankman,* 29 Cal. 19; 87 Am. Dec. 146; *Halleck* v. *Moss,* 22 Cal. 266; *People* v. *Hagar,* 52 Cal. 171; *Barrett* v. *Carney,* 33 Cal. 536; *Freidlander* v. *Loucks,* 34 Cal. 23; *Lent* v. *Tillson,* 72 Cal. 404.) The judgment in the special proceeding is final and conclusive against all persons interested in the district or its bonds. (*Lent* v. *Tillson,* 72 Cal. 404; *San Francisco* v. *Certain Real Estate,* 42 Cal. 519.)

BELCHER, C. C.—An irrigation district known as the Poso Irrigation District was organized by the board of supervisors of Kern County, under the act passed by the legislature of this state, and commonly called the Wright act. (Stats. 1887, p. 29.) A board of directors for the district was elected, and the members qualified and entered upon the discharge of their duties. In performance of the duties prescribed by the act, the board estimated and determined that the amount of five hundred thousand dollars was necessary to be raised for the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of the act. Thereupon the board called a special election, to be held on a day named, at which was submitted to the qualified electors of the district the question whether or not the bonds of the district should be issued in the amount so determined. Notice of the election was given and published in the manner and for the time prescribed by the act, and the election was held pursuant to the call. When the returns of the election were canvassed, it was found and determined that a majority of the votes cast were in favor of the issuance of the bonds,

and thereupon the board ordered that bonds of the district to the amount of five hundred thousand dollars be immediately prepared and issued in the manner and form provided by the act. Subsequently the board made another order, that the bonds to the amount of two hundred thousand dollars be offered for sale.

All the foregoing proceedings were apparently regular, and in compliance with the provisions of the Wright act.

After the entry of the order for the sale of the bonds, the board of directors, under the act supplemental to the Wright act, "and to provide for the examination, approval, and confirmation of proceedings for the issue and sale of bonds issued under the provisions of said act" (Stats. 1889, p. 212), commenced a special proceeding in the superior court of Kern County for the purpose of having all the proceedings for the organization of the district and the issue of the bonds judicially examined, approved, and confirmed. A petition for confirmation, in due form, was filed, and thereupon the court fixed a day for the hearing of the petition, and ordered notice to be given and published for the time and in the manner prescribed by the act; and in pursuance of this order notice in proper form was duly given and published.

At the time appointed, the matter was heard upon oral and documentary evidence, and thereafter the court filed its findings of fact and conclusions of law, and entered its judgment approving and confirming all of the proceedings for the organization of the district and for the issue of bonds; and it "further ordered, adjudged, and decreed that the said Poso Irrigation District, ever since its organization as aforesaid, has been, and now is, a duly and legally organized irrigation district, and that it possesses full power and authority to issue and sell, from time to time, the bonds of said district to the amount of five hundred thousand dollars."

The plaintiff herein did not appear in the confirmation proceedings, but after the entry of the judgment of confirmation, he commenced this action to obtain a decree enjoining the sale of the bonds.

For the purpose of showing that the plaintiff is a proper party to bring the action, the complaint alleges that he is the owner of lands within the district, and that they will be subject to assessment to raise money to pay the bonds, if they should be sold. It then, after stating facts sufficient to show that there was, in form, a regular organization of the district, and an apparent compliance with the provisions of the statute for the issue of bonds, proceeds to allege that the board of directors has no power to issue or sell the bonds, because,—1. The petition which was presented to the board of supervisors for the organization of the district was not in truth signed by fifty freeholders, nor by a majority of the freeholders, then or at any time owning land within the proposed district, and that not more than thirty of the persons whose names purport to have been signed to the petition ever were freeholders within the district; 2. That notice of the time and place when and where the election for the organization of the district would be held was not in fact published for the full period prescribed by law; 3. The lands of plaintiff were not susceptible of irrigation by the same system of works applicable to the other lands of the district, and they would not be benefited by irrigation thereby; 4. The notice of the special election upon the question whether bonds should be issued was not published or posted for the full period prescribed by law; 5. The board of directors wrongfully and unlawfully estimated and determined that it was necessary to raise five hundred thousand dollars for the purposes of the district, when in fact it was necessary to raise only two hundred thousand dollars for those purposes.

The answer of the defendant sets up the judgment

of confirmation in bar of the action, and is, in effect, that the matters of irregularity and illegality stated in the complaint were conclusively determined by that judgment. To the answer, the plaintiff filed a general demurrer, and thereupon, the vital question in the case being whether the plaintiff was estopped by the judgment of confirmation, the parties stipulated that final judgment should be rendered in accordance with the decision upon the demurrer. The court overruled the demurrer, and rendered judgment for the defendant. From that judgment the plaintiff appeals.

There can no longer be any question that the Wright act is constitutional, and that irregation districts organized under its provisions, like reclamation districts, are public corporations. (*Turlock Irrigation District* v. *Williams,* 76 Cal. 360; *Central Irrigation District* v. *De Lappe,* 79 Cal. 351.) The districts are authorized to construct irrigation works, and to that end to issue bonds bearing interest at the rate of six per cent. per annum, the interest payable semi-annually, and the principal in installments extending over twenty years. These bonds are, from time to time, to be offered for sale, and to be sold to the highest responsible bidder, provided that not less than ninety per cent of their face value shall be accepted. And they are to be paid, interest and principal, by revenue derived from an annual assessment upon the real property of the district.

It is a matter of every-day observation that bonds bearing such a rate of interest, and about whose validity and payment at maturity there is no question, can be readily sold for considerably more than their face value, while bonds which are liable to be assailed and questioned, years after their issue, by any one who is required to contribute to their payment, are reluctantly taken at any price. It was doubtless for the purpose of settling all these matters in advance, and thereby making the bonds of irrigation districts more readily salable,

and at better prices than they would otherwise command, that the legislature passed the confirmation act, providing that the districts might, before offering any of their bonds for sale, have all questions affecting their validity judicially and finally determined.

The confirmation proceeding is denominated in the act a special proceeding, and it is clearly in the nature of a proceeding *in rem,* the object being to determine the *status* of the district and its power to issue valid bonds. The fifth section of the act is as follows:

"Sec. 5. Upon the hearing of such special proceedings, the court shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organiation of said district under the provisions of the said act [Wright act], from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale, and the sale thereof." (Stats. 1889, p. 212.)

That the legislature had power to pass an act to accomplish the purposes intended by this act cannot be questioned. Nor is it pretended that the appellant did not have notice of the confirmation proceedings, or that he was in any way or for any reason prevented from appearing therein and raising all the objections which he now seeks to raise. The contention is, simply, that no process issued in those proceedings was served on him personally, and hence that he was not obliged to appear, and his rights are not barred by the judgment, but he is at liberty now to make "any attack upon the proceedings for the issue of bonds, including the proceedings for the organization of the district, that he could have made had there been no judgment of confirmation." To hold otherwise, it is claimed, would have the effect of depriving him of his property without due process of law.

It will be observed that the question is, not whether the valuation of the land for the purposes of assessment can be made and definitely fixed without further notice to the land-owner, nor whether the assessment can be collected without further notice, but simply, whether the notice by publication and posting was sufficient to give the court jurisdiction to determine that the proceedings taken for the organization and on behalf of the district were such as will enable the district to create a valid debt to be paid by the levy of assessments in the manner provided by the Wright act.

In our opinion, the contention of appellant cannot be sustained. It was not necessary, we think, that personal service be made upon all or any of the land-owners of the district, in order to give the court jurisdiction and power to render a judgment valid and binding as against them and all the world upon all the questions involved in the case. And this view seems to be well supported by the authorities.

In *Pennoyer* v. *Neff*, 95 U. S. 727,—a case largely relied on by appellant,—the supreme court of the United States held that, where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service by publication upon a non-resident of the state is insufficient for any purpose, and at the same time declared that "such service may answer in all actions which are substantially proceedings *in rem*."

In this state, constructive notice, given in such way as is provided by statute, of proceedings for the probate of wills, and of all proceedings in the administration of estates of decedents, has always been regarded as sufficient. In *State* v. *McGlynn*, 20 Cal. 233, 81 Am. Dec. 118, it was held that the probating of a will was a proceeding *in rem*, and that the decree admitting a will to probate was conclusive, not only upon the parties who were before the court, but upon all other persons. In its opinion the

court quotes the following language, used by the supreme court of Vermont in *Woodruff* v. *Taylor,* 20 Vt. 65: "The probate of a will I conceive to be a familiar instance of a proceeding *in rem* in this state. The proceeding is in form and substance upon the will itself. No process is issued against any one; but all persons interested in determining the state or condition of the instrument are constructively notified by a newspaper publication to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money or do any particular act, but that the instrument is, or is not, the will of the testator. It determines the *status* of the subject-matter of the proceeding. The judgment is upon the thing itself; and when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument, as to all the world (at least so far as the property of the testator within this state is concerned), just what the judgment declares it to be." (See also *In Matter of the Will of Warfield,* 22 Cal. 51; 83 Am. Dec. 49; *Rogers* v. *King,* 22 Cal. 72; *Halleck* v. *Moss,* 22 Cal. 266; *Irwin* v. *Scriber,* 18 Cal. 500.)

So in an action brought against the land, and all owners and claimants known and unknown, to recover a street assessment, it has been held that constructive service of process may be sufficient to authorize the court to render a judgment which is conclusive and binding upon all the world, until reversed on appeal, or set aside by some direct proceeding brought for that purpose. (*Mayo* v. *Ah Loy,* 32 Cal. 477; 91 Am. Dec. 595; *People* v. *Doe,* 36 Cal. 220; *Eitel* v. *Foote,* 39 Cal. 439.)

So, too, in insolvency proceedings, it has been held that notice by publication is sufficient to give the court jurisdiction over the subject-matter and the parties. (*Bennett* v. *His Creditors,* 22 Cal. 38; *Friedlander* v. *Loucks,* 34 Cal. 18; *Arnold* v. *Kahn,* 67 Cal. 472.)

Many other analogous cases might be cited, but we think the above sufficient.

The decision in *Mulligan* v. *Smith,* 59 Cal. 206, cited by appellant, is not in conflict with what has been said. That case was ejectment to recover possession of a lot of land which had been sold to pay an assessment under the Montgomery Avenue act. The act required that a petition signed by a majority of the owners in frontage of the property to be charged with the costs of the improvement be presented to the mayor; that a board of public work be then organized, and that it make a report showing the benefits and damages resulting from the improvement to each piece of property within the district to be assessed, and that the report be presented to the county court for approval and confirmation.

This court, on page 231, said: "In no part of the statute does it appear that any provisions were made for any notice to be given to property owners of the proceedings authorized to be taken before the mayor, or of the proceedings by the board of public works, or in the county court, against the property declared to be benefited by the opening of the avenue. No personal notice was in fact given to the defendant of the presentation of the petition, or of any of the acts of the board. Neither the mayor nor the board was required to give notice until the board had completed the report of its work. Then the statute required it to publish a notice for twenty days, in two daily newspapers printed and published in the city and county of San Francisco, that the report would be open for the inspection of all parties interested, at the office of the board, every day, during ordinary business hours, for thirty days."

And against, on page 232: "Nowhere in the statute is the petition made part of the report, or of the *data* or documents used in making it. Nor is it anywhere required that the board or the mayor shall return it to the court, or file it there or elsewhere. The court had therefore no jurisdiction of the petition,—no power to adjudge upon its execution; and it could not assume

jurisdiction of it, or by its judgment decide upon its sufficiency and validity, so as to conclude the defendant. And in adjudicating upon the report itself, the court acquired no jurisdiction of the person or property of the defendant, so as to determine his rights. Both, it is true, were within the territorial limits of the jurisdiction of the court, but no actual or substituted process of law had been served upon one or the other."

It was accordingly held that the court below rightly admitted evidence to show that the petition was not signed by the owners of a majority in frontage of the lands assessable for the opening of the avenue.

On the other hand, our attention is called to *Lent* v. *Tillson*, 72 Cal. 404, in which was involved the validity of the proceedings taken for the widening of Dupont Street, in the city and county of San Francisco, under the provisions of an act passed for that purpose. It was held, in an able and elaborate opinion by Mr. Justice Temple, that notice by publication, as required by the act, was sufficient to constitute due process of law, by which all persons whose rights were affected by the proceedings had before the county court were brought into court, and was sufficient from that time on to charge them with notice of everything done, and to uphold the final order of the court.

We conclude that the court below had jurisdiction in the confirmation proceedings of the subject-matter and the parties, and that its judgment is conclusive and binding upon the defendant and all the world, until reversed on appeal, or set aside by some direct proceeding instituted for that purpose.

We therefore advise that the judgment be affirmed.

VANCLIEF, C., and HAYNE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 12879. In Bank.—December 16, 1890.]

GEORGE E. WHITE, RESPONDENT, *v.* MILO PATTON ET AL., APPELLANTS.

FORECLOSURE OF MORTGAGE — PLEADING — ANSWER OF SUBSEQUENT MORTGAGE—CROSS-COMPLAINT—SERVICE—DEFAULT.—In proceedings for the foreclosure of a mortgage, the answer of a subsequent mortgagee, which sets up a junior mortgage and prays for a foreclosure thereof, must be treated as a cross-complaint, and must be served upon all the parties affected thereby, including the mortgagor, though he has made default upon the original complaint.

ID.—JUDGMENT BY DEFAULT—JURISDICTION—APPEAL.—Where such service is not made, the court has no jurisdiction to render judgment of foreclosure by default in favor of the subsequent mortgagee, even though the parties against whom the default was taken were properly served with summons issued on the original complaint and had failed to appear; and the error in rendering such judgment will be corrected upon appeal from the judgment by default.

APPEAL from a judgment of the Superior Court of Mendocino County.

The facts are stated in the opinion of the court.

T. L. Carothers, for Appellants.

J. A. Cooper, J. K. Chambers, and *C. W. Rohrbough,* for Respondent.

Fox, J.—Proceedings for foreclosure of mortgage. Defendants Patton, the mortgagors, made default, but the defendant Thompson, who was alleged to make some claim as a subsequent mortgagee, answered, setting up a junior mortgage made by the same mortgagors, and prayed that after the satisfaction of plaintiff's mortgage the proceeds of sale should be applied to the payment of the amount due upon such junior mortgage, and for judgment for deficiency, if any there should be, against the Pattons. The court rendered judgment accordingly, and the Pattons appeal.

Appellants claim that the answer of Thomson was really a cross-complaint. Such really was its effect, and

for the purposes of this appeal we shall treat it as such. It prayed for, and under it there was granted to him, affirmative relief against his co-defendants Patton; and the question is, whether the proceedings were such as gave the court jurisdiction to grant that affirmative relief. It is not pretended that the allegations of the pleading were not sufficient to support such a judgment; but the claim is, that the court never acquired jurisdiction to render the judgment and decree of foreclosure of this second mortgage, for want of proper service, or of any service, upon the defendants against whom the judgment ran. In this contention we think appellants are correct.

By the service of the summons issued upon the complaint of plaintiff, the court acquired jurisdiction of the parties, and control of all the subsequent proceedings. (Code Civ. Proc., sec. 416.) But what is meant by those words, 'all the subsequent proceedings"? Manifestly it means proceedings upon that complaint, and for that cause of action. It had jurisdiction to hear and determine the rights of all the parties as to the questions involved in the cause of action stated in that complaint. It could ascertain and determine the amount due to plaintiff, and enter a decree foreclosing his mortgage, as against the claims of all the defendants; or if it had found the mortgage of defendant Thomson to be a prior mortgage, instead of a subsequent one, it could have granted him proper relief as against the plaintiff, provided the plaintiff had been properly served with the cross-complaint. But *quoad* the plaintiff's cause of action, defendants Patton, the mortgagors, who alone were personally liable in the action, had a perfect right to make default, and let the plaintiff have the relief he prayed against them without contest. It did not follow that their default upon the plaintiff's summons would give the court jurisdiction to enter another, further, and different judgment against them, in favor of another and different party, upon another and different cause of ac-

tion, and of which they were in no manner put upon notice,—against which they had no "day in court." Such a proceeding, even if authorized by statute, would be in direct violation of a right guaranteed by the constitution, and one depriving the parties of their property "without due process of law."

But such a proceeding is not authorized by the statute. Thomson was a proper party defendant. He might have made default, like his co-defendants, and like the defendant Marks, who was also sued as a junior mortgagee, allowed his right to be foreclosed at the same time that the right of the mortgagors was; but he elected to come in. In coming in, he might have set up his mortgage, by way of showing his right, and then contented himself with contesting simply the right, or the priority of the right, of plaintiff. But he attempted to go further, and seek to foreclose, in the same action, and against, not the plaintiff, but all his co-defendants, his mortgage, and to secure a deficiency judgment against the defendants Patton. This, too, the statute gives him the right to do, but not without giving notice to the persons against whom he sought affirmative relief. Even if those persons had been present in court, actively contesting the claim of plaintiff, they would have been entitled to actual and full notice of the claim set up by defendant Thomson, and of the affirmative relief which he demanded, and to an opportunity to defend against it. They were entitled to service of the cross-complaint, and to demur or answer thereto. Such is the express provision of the statute. (Code Civ. Proc., sec. 442.)

The statute does not in express terms require that a summons should be issued upon the cross-complaint, and we are not disposed to hold that one should have been so issued in this case; but there should be at least the notice required by the statute,—service of the cross-complaint. This presented a new cause of action, in favor of a new party, and until the party to be affected

by that cause of action was brought in by such notice as the statute prescribed, the court failed to acquire jurisdiction to adjudicate upon or determine the same. The record fails to furnish proof of any such service; there is no appearance upon or response to this cross-complaint, nor any default for want of appearance; and the court has not found, nor certified in its decree, that any such service was ever made, although it has with great particularity recited the fact of service of summons "issued upon the complaint," and "of default in that behalf." This cross-complaint is as clearly a complaint against the Pattons as was the original complaint filed by plaintiff. It has not been answered and is therefore one of the papers which must constitute a part of the judgment roll, under the first subdivision of section 670 of the Code of Civil Procedure. And although, for the reasons already shown, there was no summons issued upon it, the law requires that it must be served upon the party affected thereby. This being the law, the same subdivision requires that the judgment roll must contain the affidavit or proof of service, with a memorandum indorsed thereon of the default of the defendant thereto for want of answer. Nothing of the kind appears in this case. The court was therefore without jurisdiction to enter the judgment which was entered in favor of said defendant Thomson for affirmative relief against the defendant Patton.

The Pattons possibly might have moved the court below to set aside this portion of the judgment, on the ground of surprise, but this could only be done within six months from the date thereof. (Code Civ. Proc., sec. 473.) But it does not appear that they had any notice of the judgment within six months. The error was one against which they also had a right of appeal at any time within one year. That remedy they have taken, and on the appeal we are satisfied that they are entitled to have the error corrected.

It is therefore ordered that so much of the judgment and decree entered in this cause as directs the foreclosure of the mortgage in favor of David Thomson against the defendants Milo and J. H. Patton, and directing judgment against them in favor of said Thomson for any deficiency that may remain after the sale of the mortgaged premises, and the application of the proceeds thereof, be reversed, and the case remanded.

Beatty, C. J., Thornton, J., and Paterson, J., concurred.

[No. 14019. Department Two.—December 17, 1890.]

In the Matter of the Estate of MAN WO CHAN, Deceased.

Contest of Will—Evidence—Facts not Occurring at Trial—Argument of Counsel.—Upon a contest of a will, the issue as to the validity of the will must be determined solely upon the evidence introduced at the trial; and the court cannot properly consider any facts not occurring at the trial, and which were stated for the first time in the argument of counsel.

Id.—New-trial Statement — Amendments — Appeal — Presumption.—Where the judge who tried the contest of a will, and rendered judgment for the contestant, amended the statement on motion for new trial, against the objection of the proponent of the will, by inserting facts adverted to in the argument, but which were not proved or offered to be proved at the trial, it must be presumed upon appeal that the court, in coming to its conclusion, considered the facts contained in such amendment, and the judgment will be reversed.

Appeal from a judgment of the Superior Court of Fresno County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Nourse & Short, Goucher & Jones, Theodore H. Hittell, and *Edward J. Pringle,* for Appellant.

Hinds & Merriam, for Respondent.

McFarland, J.—This is an appeal by W. W. Gray, petitioner for the probate of a proposed will of Man Wo

Chan, deceased, from a judgment denying the admission of said will to probate, and from an order denying a new trial.

The only evidence in the case was that introduced by the appellant. Two persons testified that they were subscribing witnesses; and their testimony (if they were credible witnesses) might be sufficient to establish the due execution of the proposed will. Another witness also testified, with some degree of positiveness, that the signature to the will was that of the deceased. The contestant, E. H. Cox, who had been appointed and was administrator, did not introduce any evidence. Still, the court must have believed that the will was a forgery; for the only finding of fact is, "that the will propounded by said Gray is not genuine, and was not executed by said Man Wo Chan, deceased, in his lifetime." Of course the court below, sitting as a jury, was the judge of the credibility of the witnesses; and if the court had decided the issue upon the evidence before it, and had based its judgment upon a disbelief of the witnesses, we would not disturb it. It is evident, however, that the court considered matters not before it at all.

Appellant presented a statement on motion for new trial, which included the evidence and proceedings introduced and occurring on the trial of this contest between the appellant and the contestant, Cox. The statement then contains the following: "On motion of counsel for contestant, Cox, and against the objection of counsel for respondent, Gray, the following amendments *and facts that had been previously* shown in the case, viz., the estate of Man Wo Chan, and were adverted to on the argument of the will contest, were *made a part of this statement,* to the allowance of which amendments counsel for respondent duly excepted. The amendments are as follows." Then follow statements that Ah Qui, a brother of the deceased, had on a former occasion signed a request that Cox be appointed administrator; that there

had once been a contest between Cox and the public administrator, in which it had been *shown by testimony* that Mr. Hinds, attorney for Cox, had made particular search among the effects of the deceased for a will, and had made inquiry about it of his said brother, Ah Qui, and others, and that this will in contest was not produced, but that a certain other document was produced, which was not attested; and that the widow of deceased also requested the appointment of Cox as administrator, but died before the said contest between Cox and the public administrator had been heard. Of course these amendments should not have gone into the statement; for they confessedly contain things which did not occur at the trial. If contestant considered these things relevant and material, he should have offered to prove them, and appellant would have had the opportunity to object, or to disprove or explain them. The fact, for instance, that Ah Qui, who was a brother of deceased, and interested in the estate, and named in the proposed will, and who, according to the subscribing witnesses, was present when the will was made and took possession of it, made no mention afterwards of said will, and requested that Cox be appointed administrator, upon the theory that there was no will, may have had, and possibly did have, great weight with the court. And as the court put these amendments into the statement, it must be presumed that the court, in coming to its conclusion, considered the things which the amendments contained. It is apparent, therefore, that there was not a fair trial of the case. The appellant is entitled to have the issue as to the validity of the proposed will determined upon evidence introduced at the trial of such issue, and upon such evidence alone. For this reason, the judgment and order must be reversed.

Judgment and order reversed, and cause remanded for a new trial.

Thornton, J., and Sharpstein, J., concurred.

[No. 13686. Department Two.—December 17, 1890.]

THE FIRST NATIONAL BANK OF RIVERSIDE, RESPONDENT, *v.* L. M. HOLT ET AL., APPELLANTS.

PLEADING—DEMURRER FOR UNCERTAINTY—COPY OF NOTE—INDORSEMENT OF PAYMENTS—EXECUTION.—A complaint alleging that defendants executed their promissory note to the plaintiff upon a certain day, "which note is in the words and figures following," and setting forth a copy of the note, showing indorsements thereon of payments of later date than the date of the note, and alleging a payment upon the note of a sum equal to the sum of the indorsements, is not subject to a special demurrer for uncertainty as to whether the indorsements were a component part of the note at the time of its execution, or were subsequently added, nor as to whether the copy of the note set forth is a copy of the note executed.

ID.—FORECLOSURE OF MORTGAGE—REASONABLE ATTORNEY'S FEES.—Where the mortgage provides that, in the event of foreclosure, "reasonable attorney's fees, to be taxed by the court, shall be allowed to plaintiff," an allegation in an action of foreclosure that "two hundred dollars is a reasonable attorney's fee to be allowed to the plaintiff for the collection of the said promissory note, and for the foreclosure of the said mortgage," being limited to the action in hand, is neither ambiguous nor uncertain; and even if the averment were uncertain, it would not be ground of demurrer, as no averment as to what would be a reasonable fee is necessary.

FORECLOSURE OF MORTGAGE—FINDINGS—PERCENTAGE—APPEAL — OBJECTION FOR FIRST TIME.—In an action to foreclose a mortgage, where the court finds that there was due to the plaintiff from the defendants a certain sum for "costs, percentage, and necessary disbursements, including attorney's fees," and this sum was included in the judgment, an objection that the court was not authorized to add a percentage to the costs and disbursements cannot be considered for the first time on appeal.

APPEAL from a judgment of the Superior Court of San Bernardino County.

The facts are stated in the opinion.

W. J. McIntyre, and *H. Goodcell, Jr.*, for Appellants.

E. B. Stanton, for Respondent.

BELCHER, C. C.—This is an action to foreclose a mortgage. The defendants demurred to the complaint,

and their demurrer was overruled. They failed to answer within the time allowed, and thereupon judgment was entered against them, from which they appeal.

The demurrer was upon the grounds of ambiguity and uncertainty, and it specified three particulars wherein it was claimed that the complaint was defective.

The first specification is, that it does not appear whether the indorsements on the promissory note, set forth in the complaint, were part of the note at the time of its execution, or afterwards written thereon, or whether the said note is a copy of the note executed by the defendants.

The complaint alleges that the defendants executed their promissory note to the plaintiff on December 24, 1888, payable three months after date, "which note is in the words and figures following, to wit"; and then sets forth a copy of the note, with the following words and figures after the signatures:—

"Due March 24, 1889.

[Indorsed]

"January 19, 1889, on Boyd note.....$107 30
March 26, 1889, on M. D. Godfrey note.. 216 00
May 2, 1889, paid ..... 268 44"

It is argued for appellants that the words and figures following the signatures appear, according to the averment, to have been a competent part of the note, and yet that they show three dates, all later than the date, and two of them later than the maturity, of the note, which, without explanation, convey the idea that the indorsements were not part of the note as originally made, but were added subsequently; and it said that this idea, being contrary to the apparent averment, and there being no explanation, makes the complaint uncertain in this respect. It is also argued that it does not appear whether or not the note set forth, with or without the indorsements, is a copy of the note executed by the defendants, because from the averment that the "note *is* in the

words and figures following," it is only a matter of inference that it *was* in the same words and figures at the date of its execution; and it is said that an averment which has to be helped out by inference is insufficient as against a special demurrer.

We see no real uncertainty in the averments complained of. The indorsements were evidently intended to represent payments made and credited upon the note at the dates shown thereon. These payments aggregate the sum of $591.74, and the complaint alleges "that the said defendants have paid upon the note hereinbefore set forth . . . . the sum of five hundred and ninety-one and seventy-four hundredths dollars, and there is now due and unpaid upon the said promissory note from the said defendants to the said plaintiff the sum of sixteen hundred and sixteen and sixty-three hundredths dollars, together with interest," etc. The last-mentioned sum is just the amount of the principal of the note, less the amount of the payments indorsed thereon. Looking, then, at the whole complaint, it is clear that there was no such uncertainty in its averments as could create or leave in the minds of the defendants any reasonable doubt as to their meaning; and this being so, the complaint must be held sufficiently certain to meet the requirements of the law. The objection that it does not appear that the note set forth in the complaint is a copy of the note executed by the defendants is not even plausible. The complaint alleges that, on the twenty-fourth day of December, 1888, the defendants "made, executed, and delivered to the plaintiff their promissory note, bearing date on that day, which note is in the words and figures following." This certainly leaves no room for doubt or cavil that the note set forth is a copy of the note executed.

The second specification is, that "it does not appear at what time the $591.74 credited upon the note was paid, and it therefore does not appear upon what amount

or from what time interest should be computed thereon." This objection is sufficiently answered by what has already been said; and besides, the payments were credited upon the principal of the note, and there was therefore no uncertainty as to how the interest on the balance should be computed.

The third specification is, that "it does not appear what would be a reasonable attorney's fee for the plaintiff in this action."

The mortgage, as shown by the complaint, provides that, in the event of foreclosure, "reasonable attorney's fees, to be taxed by the court, shall be allowed to the plaintiff." And it is alleged "that two hundred dollars is a reasonable attorney's fee to be allowed to the plaintiff for the collection of the said promissory note, and for the foreclosure of the said mortgage."

In this state there can be but one action for the recovery of any debt secured by mortgage. (Code Civ. Proc., sec. 726.) The obvious purpose of this action was to recover the amount due on the note set out, by a foreclosure of the mortgage and the sale of the mortgaged property. And it was only to aid the plaintiff in accomplishing these ends that the allowance of an attorney's fee was authorized by the mortgage, and was asked for in the complaint. The averment that the sum claimed was a reasonable fee for the collection of the note *and* foreclosure of the mortgage was limited to the action in hand, and was therefore neither ambiguous nor uncertain. Besides, if the averment were uncertain, as claimed, still that fact would not aid the appellants here, for the reason that no averment as to what would be a reasonable fee was necessary. (*Carriere* v. *Minturn,* 5 Cal. 435; *Monroe* v. *Fohl,* 72 Cal. 571.)

The court found that there was due to the plaintiff from the defendants the sum of $162.15 for "costs, percentage, and necessary disbursements, including attorney's fees," and this sum was included in the judgment.

It is objected that there was no provision of law authorizing the court to add a *percentage* to the costs and disbursements, and that the judgment is therefore, in this particular, clearly erroneous. But it does not appear that any portion of the sum allowed was for percentage; and if such was the fact, the defendants should have raised the point in the court below, where the error, if any, might readily have been corrected.

We see no error in the record, and therefore advise that the judgment be affirmed.

HAYNE, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 20739. In Bank.—December 17, 1890.]

EX PARTE BENJAMIN HODGES, ON HABEAS CORPUS.

EXTERMINATION OF WILD ANIMALS—POWER OF SUPERVISORS—CONSTRUCTION OF COUNTY GOVERNMENT ACT.—The power conferred by the County Government Act upon boards of supervisors to provide for the destruction of gophers, squirrels, and other wild animals, noxious weeds, and insects, etc., should be upheld in all cases, where the means employed are reasonable, and not otherwise objectionable, but cannot be extended so far as to require a land-owner, under a penalty, to exterminate wild animals of which he is not the owner, and over which he cannot in the nature of things have any control or dominion.

ID.—DESTRUCTION OF GROUND-SQUIRRELS—UNREASONABLE ORDINANCE—MISDEMEANOR—HABEAS CORPUS.—An ordinance requiring all occupants of lands, within ninety days, to exterminate and destroy the ground-squirrels on their respective lands, and thereafter to keep said lands free and clear therefrom, and declaring the violation of the ordinance to be a misdemeanor, is unreasonable and burdensome, and one convicted of a violation thereof is entitled to a discharge on *habeas corpus*.

ID.—POLICE AND SANITARY REGULATIONS—CONSTITUTIONAL LAW.—The ordinance is not a police, sanitary, or similar regulation, and is not authorized by section 2 of article 11 of the state constitution, providing for the enforcement by counties of police, sanitary, or other regulations not in conflict with general laws.

ID.—POLICE POWER—CONSTRUCTION OF CONSTITUTION.—Under section 2 of article 11 of the state constitution, providing for the making and enforcing "of all such local, police, sanitary,

and other regulations as are not in conflict with the general laws," "other regulations" must be limited to objects similar to those denominated police and sanitary.

Application to the Supreme Court for a discharge on a writ of *habeas corpus*. The facts are stated in the opinion of the court.

Latimer & Brown, for Petitioner.

W. S. Tinning, for Respondent.

Works, J.—This is an application for a writ of *habeas corpus*. The board of supervisors of Contra Costa County enacted the following ordinance:—

"An ordinance to provide for the extermination and destruction of ground-squirrels in the county of Contra Costa.

"The board of supervisors of the county of Contra Costa do ordain as follows:—

"Sec. 1. Ground-squirrels infesting lands in the county of Contra Costa are hereby declared to be a public nuisance.

"Sec. 2. All owners and occupants of lands within the county of Contra Costa are hereby required, within ninety days after the taking effect of this ordinance, to exterminate and destroy the ground-squirrels on their respective lands, and thereafter to keep said lands free and clear therefrom.

"Sec. 3. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor.

"Sec. 4. This ordinance shall take effect and be in force on the thirtieth day of November, 1889."

The petitioner was convicted of a violation of this ordinance, sentenced to pay a fine, and in default of payment, was committed to the county jail. He now prosecutes this proceeding, and asks that he be discharged.

The question as to the constitutionality of the ordinance is gravely and learnedly discussed by counsel on both sides, and Cooley's Constitutional Limitations, Potter's Dwarris on Construction of Statutes, Sedgwick on Constitutional Law, and other constitutional authorities, and decided cases innumerable, are cited in aid of and against its validity. It is certainly a most effective means of abating a nuisance, viz., the squirrels, and bringing about a very desirable end. We regret exceedingly that we cannot see our way clear to uphold and enforce such an important and original piece of legislation. Indeed, it would give us great pleasure to see the power here assumed applied to snakes, tarantulas, ants, flies, fleas, and other reptiles, insects, and pests, which tend to make man's life a burden, and to have it exercised and enforced in every county in the state. But we are unable to see by what right or authority of law a board of supervisors can impose upon a land-owner the burden and expense of exterminating animals *ferœ naturæ* on his own land, or elsewhere. It is true, the County Government Act, section 25, subdivision 28, gives boards of supervisors power to "provide for the destruction of gophers, *squirrels,* other wild animals, noxious weeds, and insects injurious to fruit-trees or vines, or vegetable or plant life," and this is a power that should be upheld in all cases, where the means employed are reasonable, and not otherwise objectionable. But certainly this authority cannot be so far extended as to require a land-owner, under a penalty, to exterminate wild animals of which he is not the owner, and over which he cannot, in the nature of things, have any control or dominion. From our limited knowledge of the nature of the squirrel tribe in this state, such a task would seem to us to be almost, if not quite, impossible.

The ordinance requires that all occupants of lands, *within ninety days,* exterminate and destroy the ground-

squirrels on their respective lands, and *thereafter to keep said lands free and clear therefrom.* This might be successfully done by the free and judicious use of poison, and perhaps by some other means, on very small tracts of land, but on large tracts it would certainly require eternal vigilance, if it could be accomplished at all, and if, after the extermination of the intruders on his own lands, one, only one, should come over from the land of his neighbor, the ordinance would be violated. The occupant of lands bordering on another county, where no such regulation prevailed, and the pesky squirrel was allowed to propagate and grow unmolested, would be in a most unfortunate condition. Such an ordinance differs materially from laws requiring an occupant of lands to keep them free from noxious weeds, or such as make it the duty of an owner of diseased domestic animals to kill them, in order to prevent the spread of the disease. These are matters over which the property owner has control, and the requirements are reasonable and just.

The respondent attempts to sustain the ordinance by and under section 2 of article 11 of the constitution of this state, which provides that "any county, city, town, or township may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with the general laws." But the ordinance is not intended to preserve the peace and quiet of the county, or to prevent the use of one's property to the injury of another, or for the protection of the lives, limbs, or comfort of all persons, or to prevent the propagation or spread of disease, nor is it in any proper sense a police or sanitary regulation. What is meant by "other regulations," in the section cited, may be a question, but it must certainly be limited to objects similar to those denominated police and sanitary. If the board of supervisors had no authority to pass such an ordinance, then no offense was committed by the petitioner, the act or omission on his part was not a crime, the court had no

jurisdiction to try or convict him, and he is entitled to his discharge.

We know of no law which can be held to authorize a board of supervisors to enact such an ordinance, and we are quite clear that it cannot be enforced, for the reason that it is unreasonable and burdensome in the extreme.

Let the petitioner be discharged.

FOX, J., SHARPSTEIN, J., and THORNTON, J., concurred.

PATERSON, J., and MCFARLAND, J., concurred in the judgment.

[No. 13172. In Bank.—December 18, 1890.]

JACKSON EBY, RESPONDENT, *v.* BOARD OF SCHOOL TRUSTEES OF RED BANK SCHOOL DISTRICT, TEHAMA COUNTY, ET AL., APPELLANTS.

MANDAMUS—QUESTION OF TITLE—DISCRETION.—Although *mandamus* is not the appropriate remedy to determine the question of title to real estate, where such title is directly in issue, yet where the question is incidental merely, and may affect the discretion of the court in awarding or denying the writ, it is proper that the court should be satisfied upon the subject.

ID.—DEFENSE—DENIAL OF TITLE—POSSESSION OF DEFENDANT—DISMISSAL.—Where possession of the defendant appears, which is *prima facie* evidence of title, the question whether it is based upon a paramount title or not cannot be put in issue or litigated in a *mandamus* proceeding, nor can the defendant ask for a dismissal of the proceeding on the sole ground that by the answer the title to real estate is put in issue.

ID.—SCHOOL-HOUSE SITE—TITLE TO LOT.—In a proceeding for a writ of mandate to a board of school trustees to compel them to proceed to rebuild upon the old site a school-building which had been destroyed by fire, where it appears that it was resolved, at a meeting of the electors of the district, that the site should not be changed, and the district had been for a number of years in possession of the lot, using it for school purposes, under such circumstances as to authorize its continued use for such purposes, the trustees cannot raise the question of title to the lot, or plead that the district had no title thereto, as a defense to the proceeding.

ID.—EVIDENCE—POSSESSION—DEDICATION.—In such proceeding, evidence tending to show the possession of the property by the

school district, and that it was dedicated to the district for school purposes, is admissible to enable the court to ascertain whether or not it should, in its discretion, grant the writ.

ID.—PARTIES — TAX-PAYER — LOCATION OF SCHOOL-HOUSE SITE.—A taxpayer of a school district, whose children attend the school, is a party "beneficially interested," under section 1086 of the Code of Civil Procedure, providing for the issuance of a writ of mandate "on the application of a party beneficially interested," and may maintain a proceeding for a writ of mandate to compel the board of school trustees to comply with the instructions of the electors as to the location of the school-house site.

ID.—EQUITABLE REMEDY.—The existence of an equitable remedy does not deprive a party of the legal remedy of *mandamus*.

APPEAL from a judgment of the Superior Court of Tehama County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

John F. Ellison, for Appellants.

Evidence that the school district owned the lot was inadmissible. (*Babcock* v. *Goodrich,* 47 Cal. 509; *Weaverville Wagon Road Co.* v. *Board of Supervisros,* 64 Cal. 70.) Eby is not entitled to the writ, because not beneficially interested, or more interested than any other citizen of the district. (Code Civ. Proc., sec. 1086; *Linden* v. *Alameda Co.,* 45 Cal. 7; *Ashe* v. *Board of Supervisors,* 71 Cal. 236; *People* v. *Inspectors,* 4 Mich. 187; *People* v. *University,* 4 Mich. 98; *San José Ranch Co.* v. *Brooks,* 74 Cal. 463; *McCloskey* v. *Kreling,* 76 Cal. 511; *Marini* v. *Graham,* 67 Cal. 131.) *Mandamus* will not lie to restrain the school trustees from building the house which they are building, or to undo what they have done. (*People* v. *Inspectors,* 4 Mich. 189, 190.)

Chipman & Garter, for Respondent.

The court may inquire as to possession, which is *prima facie* evidence of ownership, and defendant cannot resist the *mandamus* proceeding by a denial of title. (*Babcock* v. *Goodrich,* 47 Cal. 507; *Weaverville Wagon Road Co.* v. *Board of Supervisors,* 64 Cal. 70.) The

school-house site was dedicated to school purposes, and the dedication did not require a writing or a donee to take title. (*School District* v. *Heath,* 56 Cal. 478; *New Orleans* v. *United States,* 10 Pet. 712; *Bryant* v. *McCandless,* 7 Ohio, 476; *Klinkner* v. *School District,* 11 Pa. St. 449; 2 Dillon on Municipal Corporations, sec. 510.) The plaintiff is beneficially interested. (*Maxwell* v. *Board of Supervisors,* 53 Cal. 389; *Hyatt* v. *Allen,* 54 Cal. 360; *Union Pacific R. R. Co.* v. *Hall,* 91 U. S. 354.) *Mandamus* is the appropriate remedy in this case to compel the trustees to obey the instruction of the electors, whose action was final, the trustees having refused to perform their duty. (*Newby* v. *Free,* 72 Iowa, 379; *McConkey* v. *Laub,* 71 Iowa, 636.)

WORKS, J.—This is a proceeding for a writ of mandate to the board of school trustees of Red Bank school district, in Tehama County, and the members thereof,—A. W. Coffman, C. L. Allen, and Alfred McClure,—commanding them to immediately proceed with the erection and construction of a school-building upon a certain lot within said school district, of which the district is alleged to be the owner, and to complete the same within a reasonable time.

The verified petition for the writ states, among other things, substantially the following: That some years prior to October 14, 1886, the district had built and occupied a school-house on a lot therein described; that on October 14, 1886, said school-house had been destroyed by fire; that in April, 1887, the board of trustees called a meeting of the qualified electors of the district, of whom petitioner is one, to be held on the twenty-fifth day of April, 1887, "for the purpose of determining a proposition to change the location of the school-house of said district from the said old site to a position a little less than one half mile south thereof"; that due notice of such meeting was given by posting notices as required by

law; that said meeting was held at the time and place appointed, and was organized by electing J. G. Allnut chairman, and A. W. Coffman, being the clerk of said district, acted as secretary; that it was resolved by a majority vote of the electors at said meeting that the site of the school-house should not be changed, but should remain upon the lot occupied by the house which had been destroyed by fire, and that the trustees of the district be "instructed to erect any school buildings or structures contemplated or proposed to be erected upon the location and at the place above described, and not elsewhere," and that the minutes of the meeting be entered upon the records of said district; that the secretary, Coffman, neglected and refused to keep the minutes of the meeting, or to enter them upon the records of the district; that bonds of said district had been issued and sold for the purpose of raising money to build a school-house in and for the district, and that upon the first day of December, 1887, the proceeds of the sale of the bonds, amounting to $810, were deposited in the county treasury of Tehama County to the credit of the district, and subject to be applied to the building of such school-house; that petitioner has demanded of the board and the several members thereof that they "proceed with the erection and construction of said school-house upon the premises known as the old site," but that they have neglected and refused so to do, and, contrary to the instructions and resolutions of said meeting, are proceeding to build a school-house at another and different place, and to use and apply the funds aforesaid for that purpose; that by the refusal of the board to build on the old site, and the building in a different place, taxation upon the property of the district will be increased, the property of plaintiff will be injuriously affected, and the school privileges and opportunities of the children of plaintiff will be greatly delayed and impeded, and the plaintiff is, and will be, greatly and irreparably injured and damaged, he being the

owner of a large amount of taxable property in said district, and having children that are entitled to attend school therein.

The answer of the board, and of a majority of its members, denies that at the meeting held on April 25, 1887, the electors of the district resolved not to change the site of the school-house, or that the board was instructed by that meeting to proceed to build on the old site, and alleges, on the contrary, that a resolution offered at that meeting to instruct the trustees to build on the old site was defeated by a majority of one vote; denies that the secretary neglected or refused to keep or record the minutes of that meeting, and alleges on the contrary, that the secretary did take the minutes of that meeting, and duly recorded them in the proper book of the district; denies that the district owns the old site; denies that by building on a different site taxation on the property of the district will be increased, or that plaintiff will be injured or damaged; alleges that, subsequent to the meeting of April 25th, another meeting was duly called and advertised for June 6, 1887, which was duly held on that day, for the purpose of determining as to a change of the school-house site, and at which it was unanimously resolved to instruct the trustees to build the school-house on the new site, a little less than half a mile south of the old site, where the trustees have commenced to build it.

The court found for the plaintiff on all the material issues, and awarded a peremptory mandate, which, after reciting the facts found, is in the following language: "Therefore, we do command you that, immediately after the receipt of this writ, you proceed with promptness, diligence, and dispatch to construct and erect upon the said premises, location, and site hereinbefore particularly described, a school-house in and for said Red Bank school district, and to use and apply the said fund now deposited in the treasury of the county of Tehama, state of California."

The appeal is from the judgment, and from an order denying defendants' motion for a new trial.

The answer of the defendants denied that the school district owned the land on which the old school-house stood. It is contended by the appellants that the question of title to real estate could not be tried in a *mandamus* proceeding, and that therefore, upon an answer being filed raising the question of title, the proceeding should have been dismissed. It is true that, where a question of title to real estate is directly in issue, *mandamus* is not the appropriate remedy to determine such question. (*Babcock* v. *Goodrich,* 47 Cal. 508; *Weaverville Wagon Road Co.* v. *Board of Supervisors,* 64 Cal. 70.) But where the question is incidental merely, and may affect the discretion of the court in awarding or denying the writ, it is proper that the court should be satisfied on the subject. Here it appeared that the district was, and had been for a number of years, in possession of the school lot, using it for school purposes, under such circumstances as to authorize its continued use for those purposes. The mere fact of possession was *prima facie* evidence of ownership. Whether such possesson was based upon a paramount title or not was a question which could not be put in issue by the answer and litigated in this proceeding, nor could the defendant ask for a dismissal on the sole ground that by its answer the title to real estate was put in issue. In *Weaverville Wagon Road Co.* v. *Board of Supervisors,* 64 Cal. 70, it was said: "It appears, by the findings, that the plaintiff was incorporated in 1863, and that it in some way obtained possession of the wagon-road which it was incorporated to construct and operate, and that it has ever since retained the possession of it. Such possession was *prima facie* evidence of ownership. Whether based upon paramount title or not was a question which could not be inquired into, except in an action or proceeding in which some person who claimed a better title was a party; and

that it could not be tried by a board of supervisors, nor in a proceeding to determine whether a mandate should issue to compel the performance by said board of a duty imposed upon it by law. The question of title can be inquired into and determined in a proper proceeding, but clearly not in this." So in this case, if the proper residents in the school district had taken the necessary steps to impose upon the board of trustees the duty of constructing the school-house on this property, the board could not evade the performance of its duty by asserting that the district had no title to the property. It was not a question for the board to pass upon. It was enough that they were directed in the manner provided by law to erect the school-house, and they should have acted accordingly. (Pol. Code, sec. 1617, subd. 20.)

Certain evidence tending to show the possession of the property by the school district, declarations of the owners of the land tending to show a dedication of the property to the district for school purposes, and other like testimony, was admitted, and it is claimed by the appellant that this was error, for which the cause should be reversed. As we have said, the question whether the school district had or had not a good title to the property was one not proper to be litigated in his action. But it was entirely proper for the court below to be assured, by proper evidence, that the possession of the district was such as to secure to it the continued use of the property in case a school-house should be constructed upon it, in order to determine whether the court should or should not, in its discretion, award the writ. For this purpose the evidence was proper, although not necessary to the plaintiff's case.

Other items of evidence admitted are objected to, but we find that no error was committed in ruling upon the evidence for which the case should be reversed.

It is insisted that the finding that the school district was the owner of the land was not sustained by the evi-

dence. We think the evidence was sufficient to show a dedication and acceptance of the property, and the adverse use of it, for school purposes, sufficient to sustain the finding; but if it were not, as the question of title was one not proper to be litigated in this action, an erroneous finding on the point would not be cause for reversal.

Other findings are attacked for the same reason, but we think all of the findings necessary to justify the issuance of the writ are sustained by the evidence.

Appellants' counsel further contend that, inasmuch as it does not appear that respondent's taxes will *not* be increased by the matters complained of, he is not a party beneficially interested, in the sense of section 1086 of the Code of Civil Procedure, which requires the writ of mandate to be issued "upon affidavit, on the application of the party beneficially interested," and therefore that the proceeding cannot be maintained upon his application in his name alone.

There can be no doubt upon the findings, which are justified by the evidence, that it was the duty of the board of trustees to build the school-house upon the old site, as instructed by the meeting of April 25, 1887, within a reasonable time after the money for that purpose had been deposited in the treasury; and that a reasonable time within which to commence the building had elapsed before the commencement of this suit is sufficiently evinced by the admitted fact that the trustees had commenced to build on another site than that selected by the meeting of April 25th, before the commencement of this suit.

The interest of the plaintiff in the performance of this duty by the trustees of the district resulted from his being a resident elector of the district having a family of minor children entitled to school privileges therein. After the site for the school-house had been lawfully established and fixed by the meeting of the electors, he was entitled to all the benefits and conveniences inci-

dentally resulting therefrom to him individually, besides his interest in common with other residents of the district in having the trustees perform an official duty enjoined by law for the common benefit of all. It is claimed, however, that if the removal of the school-house works a detriment to him it must effect a corresponding benefit to others equally entitled to such benefits, and therefore that he has no right to complain. This may be true in the case of a lawful location or removal of a school-house, but it is not true in case of an unlawful removal; for while all would be entitled to the benefits and conveniences accruing from a lawful location or a lawful removal of a school-house, no one would be *entitled* to any benefit from an unlawful removal. It is true that the injury to respondent is the same in kind as that suffered by all others from whose residences the new site is more distant than the old, if any such there are, and this seems to be the only plausible ground upon which it is contended that respondent is destitute of the beneficial interest necessary to the prosecution of this action in his own name, and the case of *Linden* v. *Alameda County,* 45 Cal. 7, is cited to sustain this position. That was a case of *mandamus* to compel the board of supervisors to order an election to determine the question of removal of the county seat, on the petition of 1,452 of the qualified electors of the county, of whom the applicant for the *mandamus* was one.

In sustaining a demurrer to the application, the court held that the words "on the application of the party beneficially interested," as used in section 1086 of the Code of Civil Procedure, necessarily mean that the interest of the applicant "must be of a nature which is distinguishable from that of the mass of the community;" and further said: "The party applying here appears to have no interest, beneficial or otherwise, other than such interest as each one of the 1,451 persons, besides himself, who signed the petition to the board of supervisors, may

be said to have. . . . . The interest of each and all of them is only the general interest that every citizen has in the proper discharge of public duties confided by law to public officers. Obviously this is not such an interest as would support an application by any private citizen who may see fit to volunteer to bring a suit in behalf of the public interests."

But the principle announced in *Linden* v. *Alameda County,* 45 Cal. 7, has been disregarded, and, in effect, that case has been overruled by later cases. The point decided in that case is, that, to entitle a private party to apply for a writ of mandate, his interest in the subject-matter of the suit must be of a different nature from that of the mass of the community. Yet in *Hyatt* v. *Allen,* 54 Cal. 353, which was an application to this court for a writ of mandate to the assessor of the city of Stockton, in which the applicant appeared to have no other interest than that of a tax-payer, in common with all other tax-payers of that city, this court, through Mr. Justice Sharpstein, said: "We think that the petitioner, who is a tax-payer within the district of which respondent is assessor, is 'a party beneficially interested' in having all the taxable property in the district assessed, and is therefore a proper party to make the affidavit for the issuance of the writ in this case."

In *Maxwell* v. *Supervisors,* 53 Cal. 390, which was a proceeding for a writ of review to the board of supervisors to review the action of that body in behalf of the county of Stanislaus in entering into a contract for printing, in which the applicant was interested only as a tax-payer, in common with all other tax-payers of the county, the objection that the applicant was not "beneficially interested," within the meaning of section 1069 of the Code of Civil Procedure, was overruled. The language of section 1069 as to the "beneficial interest" of the applicant for a writ of review is identical with that of section 1086, relating to the inter-

est of the applicant for a writ of mandate, and no reason is perceived why it has not the same meaning in both sections.

These cases wholly disregard, and are utterly inconsistent with, the rule announced in *Linden* v. *Alameda County,* 45 Cal. 7, since the beneficial interest of one tax-payer in a question of taxation is not different in kind or nature from that of the mass of tax-payers, or from that of any other tax-payer, in the same district or community.

These later cases seem to be in accord with the weight of authority in other states and in England, as stated by Mr. Justice Strong in delivering the opinion of the court in the case of *Union Pacific R. R. Co.* v. *Hall,* 91 U. S. 354, in which *mandamus* was maintained at the suit and in the name of two merchants to compel the respondent to operate its road across the Missouri River, etc., although these merchants had no interest in the proceeding, except to receive and ship goods over the road, as did all other merchants engaged in like business. (See also Dillon on Municipal Corporations, 3d ed., sec. 865, and notes.) Besides, in this case, the respondent, as one of the patrons of the school, has, as such, an interest in the erection of the school-house, other than that of a mere tax-payer, and his interest may have been different from that of any other tax-payer in that the removal of the school-house to a distant place might have deprived his children of the benefit of attending the public schools.

The nuisance cases referred to are not in point. The rule as to the requisite interest of a plaintiff in this class of cases is specifically prescribed by section 3493 of the Civil Code, which does not apply to cases of *mandamus.*

If the respondent has not the requisite beneficial interest to enable him to maintain this action in his own name, no other person, except the district corporation, has, and that corporation is controlled by the defendants. Therefore there is no remedy at law whatever, in favor

of any party, unless the respondent can maintain this action. Perhaps the illegal diversion and use of the building fund might be enjoined by a court of equity at the suit of a member of the district corporation, but this would not be an adequate remedy; and even if it were, it is well settled that an equitable remedy does not deprive a party of the legal remedy of *mandamus*.

Judgment and order affirmed.

FOX, J., MCFARLAND, J., and SHARPSTEINK, J., concurred.

PATERSON, J., concurring.—I concur in the judgment. I do not understand that *Linden* v. *Alameda County*, 45 Cal. 7, has been overruled by the decision in any later case, and it seems to me the cases are distinguishable. A tax-payer has an interest "which is distinguishable from that of the mass of the community." Every citizen has an interest "in the proper discharge of public duties"; but every citizen is not the owner of property taxed for state or municipal purposes.

THORNTON, J.—I agree with Mr. Justice Paterson, and concur in the judgment.

Rehearing denied.

[No. 12167. In Bank.—December 18, 1890.]

MARY E. STAPLES, RESPONDENT, *v.* HENRY MAY, APPELLANT.

MINES—MORTGAGE OF PATENTED MINERAL TRACT—APPURTENANCES—LODE IN ADJOINING TRACT.—A mortgage of a patented tract of mineral land, with the appurtenances thereto, does not cover an undeveloped portion of a lode the *situs* of which is in land adjoining the patented tract; and such portion of the lode does not become parcel of or appurtenant to the tract mortgaged by being subsequently connected therewith by workings on the lode.

ID.—SUBSEQUENT POSSESSION—INCLOSURE OF MINERAL LAND—TITLE TO MINERAL LODE.—The subsequent possession of the adjoining tract, acquired by actual inclosure thereof by the mortgagor, will not inure to the benefit of the mortgagee, but is sufficient to give the possessor title to a mineral lode contained therein as against all persons not connecting themselves with the source of title by compliance with the mining laws of the United States.

ID.—FORECLOSURE SUIT—APPOINTMENT OF RECEIVER—JURISDICTION—VOID ORDER.—An order appointing a receiver in a foreclosure suit, in so far as it confers the right to occupy or mine in land not included in the mortgage or trust deed sought to be foreclosed, is to that extent in excess of the jurisdiction of the court and void.

ID.—POWER OF RECEIVER—CONSTRUCTION OF ORDER—MINING WITHOUT AUTHORITY.—An order appointing a receiver in a foreclosure suit must be construed with reference to the pleadings upon which it is based, and cannot confer color of authority upon the receiver to extract ores from lands not covered by the securities involved in the suit.

ID.—LIABILITY OF RECEIVER—PROPERTY OF MORTGAGOR—RIGHTS OF CREDITORS—PROCEEDINGS SUPPLEMENTAL TO EXECUTION.—If the receiver works ores in lands of the mortgagor which are not included in the securities involved in the foreclosure suit, he becomes liable to the mortgagor as a trespasser for the net proceeds of the ore extracted; and the general creditors of the mortgagor may avail themselves of such liability by proceedings supplemental to execution.

ID.—UNAUTHORIZED EXTRACTION OF ORES — COMMON SYSTEM OF WORKING—NET PROCEEDS.—The fact that the part of the adjoining lode from which the ores were taken by the receiver was connected by a common system of working with the mortgaged premises, which were worked at a loss, does not relieve the receiver from liability for the net proceeds of the ores taken.

ID.—EX PARTE APPOINTMENT OF RECEIVER—PRESUMPTION—RIGHTS OF GENERAL CREDITORS.—Where the orders appointing the receiver were made *ex parte*, and it is not shown that their terms, or the proceedings of the receiver under them, ever came to the knowledge of the mortgagor, and it appears that the mortgagor was insolvent, and left its general creditors

to recover what they could out of the property, without objection, the presumption is, that the mortgagor desired its property to go to its creditors according to their legal rights, and never approved the proceedings of the receiver in removing ores from the lode in the adjoining tract.

EXECUTION—SUPPLEMENTAL PROCEEDINGS—TORTS UPON PROPERTY OF JUDGMENT DEBTOR—CREDITOR'S BILL—ORDER ALLOWING SUIT.—Proceedings supplemental to execution can reach choses in action arising from torts committed on the property of the judgment debtor which might be reached by a creditor's bill; and the court in the supplemental proceedings may authorize a suit by the judgment creditor to recover such choses in action.

APPEAL from an order of the Superior Court of Santa Clara County denying a new trial.

The facts are stated in the opinion of the court.

T. I. Bergin, and *McAllister & Bergin,* for Appellant.

The descriptions in the mortgage were sufficiently comprehensive to operate upon the tract of land described in the complaint in this action, although that tract is not specifically described in them. (*Sheets* v. *Selden's Lessee,* 2 Wall. 187; *Whitney* v. *Olney,* 3 Mason, 280; *Bank of British North America* v. *Miller,* 7 Saw. 169; *Farmer* v. *Ukiah Water Co.,* 56 Cal. 13.) The plaintiff in the foreclosure suit was not only entitled but was bound to foreclose. (*Ould* v. *Stoddard,* 54 Cal. 614.) Both instruments, the McCalmont mortgage and the deed of trust to the Farmers' Loan and Trust Company, were subject to foreclosure. (*Sacramento etc. R. R. Co.* v. *Superior Court of San Francisco,* 55 Cal. 458; *Shillaber* v. *Robinson,* 97 U. S. 78.) It was the duty of the court in the foreclosure case, and it had jurisdiction, to determine and adjust the rights of all the parties, and declare the character and extent of their liens, as well as enforce their respective rights. (*Cross* v. *Zellerbach,* 63 Cal. 641; *Graham* v. *Railroad Company,* 3 Wall. 711; *Hefner* v. *Northwestern Life Ins. Co.,* 123 U. S. 756, 757; *Real Estate Savings Institute* v. *Collonious,* 63 Mo. 295.) The court had jurisdiction to appoint May receiver, and authorize

him to take such steps as were necessary to prevent the property from going to waste, as well as to authorize him to raise the funds necessary to preserve the property from going to waste and destruction. (*McLane* v. *Placerville etc. R. R. Co.,* 66 Cal. 616, 622, 627, 630.) An admitted trespasser will be allowed for expenditures made in the preservation of the property trespassed upon, or that go to its amelioration. (*Putnam* v. *Ritchie,* 6 Paige, 403–406; *Bright* v. *Boyd,* 1 Story, 494; *Jackson* v. *Ludeling,* 99 U. S. 513, 537.) While it is true that the party aggrieved may waive tort, and sue in *assumpsit* for money had and received, as the case may be, such waiver is never allowed to the prejudice or detriment of the party affected thereby. (*Lewis* v. *Dubose,* 29 Ala. 219.) It is doubtful whether an action for money had and received would lie. (*Sergeant* v. *Stryker,* 16 N. J. L. 464; 32 Am. Dec. 404.) Such action is founded upon equitable principles, and may be defended upon equitable principles. (*Curtis* v. *Ward,* 20 Conn. 204; 3 Sutherland on Damages, 482.) As May could not be held responsible to the company, neither can he be held responsible to the plaintiff. (*Smith* v. *Cunningham,* 67 Cal. 263.) Even were there any liability on the part of May to the company, such liability could not be reached through process of attachment or garnishment. Only legal debts or liabilities are subject to garnishment or attachment. (*Hassie* v. *G. I. W. U. Congregation,* 35 Cal. 378; *Webster* v. *Steels,* 75 Ill. 544; Drake on Attachments, sec. 547; *McKelvey* v. *Crockett,* 18 Nev. 242; *Lippitt* v. *Am. Wood Paper Company,* 15 R. I. 141, 145; *Eastman* v. *Thayer,* 60 N. H. 575.) A liability for tortious conversion of property is not a debt subject to attachment or garnishment. (*Lewis* v. *Dubose,* 29 Ala. 220; *Holcomb* v. *Winchester,* 52 Conn. 447; 52 Am. Rep. 609; *Detroit Post and Tribune Company* v. *Riley,* 46 Mich. 459; *Paul* v. *Paul,* 10 N. H. 117; *Despatch Line* v. *Bellamy,* 12 N. H. 205, 238; 37 Am. Dec. 203; *Getchell* v. *Chase,* 37 N. H. 109; Drake on At-

tachments, secs. 544, 545, 547, 548; *Boyle* v. *Maroney,* 73 Iowa, 74; *Johnson* v. *Brant,* 38 Kan. 758, 759.)

S. F. Leib, and *L. D. McKissick,* for Respondent.

The order appointing May receiver is not broad enough to include property not mentioned in the complaint. Even if the order had attempted to appoint a receiver for property not in the mortgage presented for foreclosure, it would, as to such outside property, have been void for want of jurisdiction. (*Corwithe* v. *Griffing,* 21 Barb. 9.) In going upon and extracting valuable ores from other property of the mining association than that which was included in the McCalmont mortgage, defendant rendered himself liable to the owner in action of trespass, notwithstanding the fact that the property was mortgaged, and the mortgagor insolvent. (Beach on Receivers, sec. 294.) It is clearly implied in the McCalmont mortgage and in the deed of trust that the mining association should hold possession and receive the earnings until the proper judicial authority should interpose and take possession. (*Gilman* v. *Tel. Co.,* 91 U. S. 603; *American Bridge Company* v. *Heidelbach,* 94 U. S. 798, and cases cited; *Chinnery* v. *Black,* 3 Doug. 391.)

BEATTY, C. J.—This is an appeal from an order overruling defendant's motion for a new trial. The cause was originally submitted in Department One, where the order appealed from was reversed upon grounds stated in an opinion by Commissioner Foote. (23 Pac. Rep. 710.)

After a rehearing and a more careful consideration of the record, we find it necessary to modify in some particulars the statement of the case as then made.

The facts are as follows: On the first day of August, 1881, in the superior court of Santa Clara County, the plaintiff and respondent herein recovered a judgment against the Santa Clara Mining Association of Balti-

more, a foreign corporation, for five thousand dollars, upon which execution was issued and returned unsatisfied. She then—proceeding under sections 717, 718, 719, and 720 of the Code of Civil Procedure—cited this defendant to answer as to his indebtedness to the corporation, and in due course obtained an order from the superior court, authorizing her to institute and prosecute an action to recover any indebtedness owing by said defendant to said corporation. In pursuance of that order, she commenced this action in October, 1881.

In her complaint she sets out the proceedings above mentioned, and alleges that between July 19, 1880, and May 31, 1881, said corporation was the owner of a tract of land, containing 160 acres, in Santa Clara County, together with the minerals and ores therein contained. This allegation is not only not denied by the answer, but is expressly found by the court to be true, and is in no wise assailed by the appellant, so that this fact at least may be set down as unquestionable: that between the dates mentioned, the Santa Clara Mining Association of Baltimore was the owner of the tract of land specifically described in the complaint, together with the ores and minerals therein contained. Whether the corporation was so the owner of said tract at a prior date—that is, at the date of the mortgage and trust deed hereinafter mentioned—is, as will be seen, one of the principal questions in the case, and will call for some discussion in its proper connection. Returning to the plaintiff's complaint, her only other allegations which it is necessary to note here are, that between said dates—July 19, 1880, and May 31, 1881—the defendant entered into and upon said tract of land; mined and extracted therefrom ore of the value of one hundred thousand dollars and upwards; reduced the same to quicksilver; sold it, and received therefor over one hundred thousand dollars, no part of which had been paid to said corporation.

These allegations are denied in the answer; and in addition to such denials, the defendant sets out with great fullness the proceedings in a foreclosure suit against said corporation, in which he was appointed receiver of the property mortgaged, which included, as he alleges, the land and mine specifically described in the complaint in this action.

The facts with respect to the mortgage, action to foreclose, appointment of defendant as receiver, and his proceedings under such appointment are as follows: In the year 1873, said Santa Clara Mining Association was the owner of a tract of land, in Santa Clara County, containing about eleven hundred acres, and adojining the tract described in the complaint herein. In this eleven-hundred-acre tract there existed a vein or lode of cinnabar, upon which some mining had been done, but at that time the lode had not been worked or explored outside of the limits of that particular tract.

Such being the case, on the 14th of June, 1873, said corporation, to secure its bonds for one hundred thousand dollars, executed a mortgage to McCalmont, and on the same day, to secure its bonds to the amount of four hundred thousand dollars, executed a deed of trust to a loan and trust company. In the year 1880, an action was commenced by the assignee of the McCalmont mortgage, against the mortgagor and other numerous parties, including the trustees under said trust deed, to foreclose the mortgage. The complaint in this action alleged the insolvency of the corporation, the existence of mines and mining works upon the mortgaged premises, the danger of loss and destruction to the property—the mine especially—if the pumps were stopped and mining operations suspended during the litigation, and prayed the appointment of a receiver to take charge of the property, and to protect and preserve it.

Accordingly, an order was made *ex parte*, at the time of the commencement of the suit, appointing this defendant

such receiver, and from time to time thereafter other orders were made by the superior court, authorizing him to borrow large sums of money to enable him to work the mine, pay taxes, and do other things deemed necessary for the preservation of the property which was the subject of the litigation.

In pursuance of these orders, the defendant entered into possession of the mine and other property, borrowed money, extracted ore, reduced it to quicksilver, which he sold, and applied the proceeds, with the general result of leaving himself, at the end of the litigation, indebted to the extent of about sixty thousand dollars for borrowed money. But although his entire operations resulted in the loss of this large sum, there was one part of the lode —known as station 8—from which he took about one hundred and thirty-eight thousand dollars, at a cost of about one hundred thousand dollars, leaving a net profit of thirty-eight thousand two hundred dollars, all of which was prior to May 1, 1881, and two years before entry of the decree in the foreclosure suit.

It is to this thirty-eight thousand two hundred dollars, or a share of it, that the plaintiff herein makes claim, upon the ground that station 8—the part of the lode from which the ore producing it was taken—is entirely outside of the mortgaged premises, and consequently, that the appellant, as receiver in the foreclosure suit, had no right to enter there; that he was in fact a trespasser, and became liable to the corporation for at least the net value of the ore. Such was the view of the superior court, and such the theory upon which the judgment in favor of the respondent was based.

Against this view the appellant urges a number of objections, which we shall proceed to consider.

1. It is claimed that the McCalmont mortgage embraced station 8. But this position we do not think can be sustained. Station 8 is a part of the lode, the *situs* of which is within the 160-acre tract specifically de-

scribed in the complaint herein, and wholly without the 1,100-acre tract to which said mining corporation had title at the date of the McCalmont mortgage, and at that time the lode had not been followed beyond the limits of said tract.

The following is the description contained in the mortgage: "All that certain parcel or tract of land being and lying in the county of Santa Clara, state of California, designated as lot number thirty-nine (39), in township eight (8) south, of range one (1) east, and lot number forty (40), in township eight (8) south, of range one (1) west, of the Mount Diablo meridian, containing eleven hundred and nine acres and sixty-seven hundredths of an acre, being the same parcel or tract of land more particularly described and delineated by plat, and to which title was confirmed in and by that certain patent issued by the United States of America, on the twentieth day of September, A. D. eighteen hundred and seventy-one, recorded in liber B patents, page 31, on the twelfth day of October, 1871, and being the same premises described in the above-recited mortgage, to R. D. Cullen, together with all and singular the buildings and improvements thereupon erected, made, or being, and the rights, roads, ways, waters, mines minerals, mining rights, machinery, privileges, appurtenances, and advantages to the same belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate and interest, right, title, use, trust, claim, and demand whatsoever, both at law and in equity, of the said Santa Clara Mining Association of Baltimore in, unto, and out of the said described property and premises, or any part thereof."

It is evident that this description cannot be stretched to cover an undeveloped portion of the lode contained in land adjoining the tract described. It is neither parcel of nor appurtenant to such tract, nor does it become

so by being subsequently connected, by workings on the lode, with that portion of the mine included in the description.

2. It is contended that the description in the trust deed to the loan and trust company is sufficiently comprehensive to include station 8, and that since the parties secured by the trust deed were parties to the foreclosure suit, claiming affirmative relief and concurring in the application for the appointment of May as receiver, he was thereby authorized to enter and mine at station 8.

It is one objection to this proposition, that it appears that the defendant extracted all the ore and made all the profit from station 8 with which he is charged in this action before the loan and trust company sought the foreclosure of their deed or asked for his appointment. But without regard to this objection, the force of which we do not care to consider, we think it must be held that the description in the trust deed embraces no more than that of the McCalmont mortgage; for it contains nothing material in addition to the description above quoted, except these words: "and all the lands, tenements, mines, minerals, real and personal property, rights, privileges, and appurtenances of every kind whatsoever, of or belonging to said party hereto of the first part, in Santa Clara County aforesaid." This part of the description would no doubt have embraced station 8 of the land in which it is found had belonged to the corporation at the date of the trust deed. But it did not belong to the corporation at that time. The court so finds by finding, as it does, that no part of the tract described in the complaint herein was included in said trust deed, and there is nothing in the bill of exceptions to show that this finding was contrary to the evidence.

The statement in respect to this matter is as follows: "That it was the owner of the lands, premises, and property specifically described in the McCalmont mortgage,

in the answer of the defendant herein mentioned, and of the lands, premises, and property specifically described in the deed of trust to the Farmers' Loan and Trust Company of New York, in the answer of the defendant herein mentioned, at the time of the execution of both of said instruments; that the particular piece of land in the complaint in this action described is not included in the specfic metes and bounds of the lands described in the said McCalmont mortgage, or in the lands specifically described in the said deed of trust of the Farmers' Loan and Trust Company mentioned therein; that at the time of the execution of the said McCalmont mortgage and said deed of trust, the legal title thereto was in the United States, and has hence hitherto been and still is in the United States, otherwise than as such title may be affected or modified by the facts following, that is to say: At the time of the execution of the said McCalmont mortgage and said deed of trust, and prior thereto, said Santa Clara Mining Association made claim of title thereto; that said particularly described parcel of land immediately joins upon the lands described in said McCalmont mortgage and in said deed of trust, and there was no fence, inclosure, or line separating said particularly described parcel of land from the lands included in the said McCalmont mortgage and in said deed of trust; that at that time said Santa Clara Mining Association had not extended its mining operations into or upon any part of said parcel of land in said complaint particularly described; that at that time the claim of title of said Santa Clara Mining Association to said parcel of land in said complaint particularly described was in fact recognized by the immediate neighbors in that vicinity, but the same was not then inclosed by any fence or inclosure separating the same from the lands surrounding it; that subsequently to the execution of said intsruments, the same was inclosed by inclosures, which, with the inclosures inclosing the land specifically

described in the said McCalmont mortgage and in said deed of trust, would make a complete inclosure, save and except that on the southerly part of said parcel of land in said complaint particularly described, there was no fence; on the side of said land not so fenced the same consisted of a canon, which canon of itself constituted a natural barrier, preventing cattle from getting into or going out of said parcel of land in said complaint particularly described, and which canon constituted the only inclosure upon that side of said parcel of land in said complaint particularly described."

This statement fully sustains the finding that at the date of the trust deed the smaller tract, containing station 8, did not belong to the corporation, and also supports the finding—if it needed support—that during the time defendant was mining at said station said smaller tract did belong to the corporation, at least as against all persons not connecting themselves with the source of title by compliance with the mining laws of the United States.

3. The third point of the appellant is disposed of in saying, as we have already said, that neither the mortgage nor the trust deed embraces station 8.

4. It is contended that even if station 8 was not covered by the mortgage or trust deed, it was comprehended in the terms of the order appointing the receiver, and being at that time connected with the mines in the larger tract, and worked as a part of the same general system, under a single management; and as the proceeds of that as well as of other parts of the lode were devoted to the care and preservation of the whole, it necessarily participated in the advantage derived from the appointment of the receiver,—an advantage which inured to the mortgagor, in enhancing the value of the security and diminishing its personal liability. Wherefore it is contended May could not have become liable to the corporation as a trespasser, and if not, that he was never liable to the plaintiff.

This position also appears to be untenable.

As to the terms of the order, if they embraced property not included in either of the securities, the order was to that extent in excess of the jurisdiction of the court and void. But construed with reference to the pleadings upon which they were based, the several orders appointing the receiver and defining his powers and duties did not apply to any property except that against which the foreclosure was sought. We do not think the receiver had ever color of authority to extract ores within the tract described in the complaint herein, and thus destroy the very substance of an estate in which the mortgagees and beneficiaries of the trust had no direct interest, but which was, on the contrary, subject to the claims of the general creditors of the corporation. Nor do we think that the circumstance that station 8 was connected with other portions of the mine, with which it was worked as part of the same system, and under a single management, makes any difference. It was none the less a distinct piece of property, to which the mortgagees, and the receiver as their agent, had no right. While they remained in the hands of the mortgagor it was perfectly natural that both properties should be worked together, if that was the more economical plan,—just as a farmer might work a mortgaged and an unmortgaged tract together, or to give a more forcible illustration, just as owners of separate locations on the same vein often use the same shaft and hoisting apparatus for raising ores, or as many locators sometimes combine for the purpose of pumping water from the lower levels. In all such cases there is a common system of working, but the properties are distinct. A receiver of a mortgaged field would have no right to cut timber from other land of the mortgagor to build fences or houses on the tract covered by the mortgage, although it might be for the benefit of the mortgagor by preserv-

ing or enhancing the value of the security, and lessening his personal liability.

And, moreover, there is nothing to show in this case that the value of the security was in any degree enhanced by the extraction and reduction of the ores. No doubt it was necessary to pump the water out of the mine, and very probably it appeared at the time to be a wise measure to carry on mining at the same time with the pumping; but if this was so, we know of no principle upon which station 8 could be charged with the expense of keeping other parts of the mine free of water. And if it be said that the work at station 8 were also preserved by and participated in the benefits of the pumping, it may be replied that there is nothing to show that its equitable share of the expense of pumping was not included in the one hundred thousand dollars deducted from the gross value of the ores extracted from station 8.

As to the claim that the corporation stood by and saw what May was doing, and, by not objecting, tacitly approved his proceedings, it does not appear to be borne out by the record. The orders appointing the receiver were made *ex parte*. It is not shown that their terms, or the proceedings of the receiver under them, ever came to the knowledge of the corporation. It does appear that the corporation was insolvent, and it seems to have left its creditors to get what they could out of its property, without making any sign of approval or objection to their proceedings. The only presumption we are entitled to indulge, under such circumstances, is, that it desired its property to go to its creditors according to their respective legal rights, viz., the mortgaged property to its mortgagees, and the rest to its creditors at large. No advantage could possibly accrue to it from any other disposition; for just so far as its ultimate personal liability to its mortgagees might be diminished by taking from its unpledged assets to enhance the security of the mortgagees, just so far was its ultimate liability

to the general creditors increased. Assuming, therefore, as we ought to assume, that the actual desire of the corporation was, that its unpledged assets should be devoted to the payment of its general creditors, and that it never, either expressly or tacitly, approved the proceedings of the receiver in removing the ores from station 8, we must hold that he became liable to the corporation for the net proceeds of such ores.

It is strenuously contended that this conclusion does a great injustice to the receiver, and that an opposite conclusion would do no injustice to the general creditors, because it is said the ores in place were not liable to attachment, and were only made available by means of a fund raised upon the credit of the secured creditors. We cannot, however, see the injustice of requiring the receiver to put back into the fund, where it belongs, a sum of money to which he never had a right; and as to the other proposition, we do not know why the 160 acres of land, with all its ores in place, were not liable to attachment, nor is there anything to show that the ores in place at station 8 were worth less than their net proceeds.

5. It is contended that the liability of May, which sounded wholly in tort, was not the subject of garnishment or attachment.

The question here, however, is, not what classes of debts are the subject of garnishment or attachment, but what liabilities of third parties to an execution debtor can be reached by proceedings supplemental to the execution. We know of no reason to hold to any narrower construction of our statutory provisions on this subject than obtains in New York, where it is said that these proceedings can reach everything which could formerly have been made to contribute to the payment of judgments by the aid of creditors' bills, and where it was held that creditors' bills would reach choses in action arising from torts committed on the property of the

judgment debtor, to which his creditor would have a right to resort. (Freeman on Executions, sec. 420; *Hudson* v. *Plets,* 11 Paige, 180.)

The sixth objection of the appellant has been sufficiently stated and considered in connection with the fourth.

We find no error in the order of the superior court, and it is therefore affirmed.

FOX, J., SHARPSTEIN, J., and MCFARLAND, J., concurred.

[No. 13731. Department One.—December 19, 1890.]

T. D. KELLOGG, APPELLANT, *v.* W. G. COCHRAN ET AL., RESPONDENTS.

INSANE PERSONS — RESTORATION TO CAPACITY — CONSTRUCTION OF CODE.—The provisions of section 1766 of the Code of Civil Procedure authorizing the court to restore a person adjudged insane or incompetent is only applicable to those for whom guardians have been appointed under section 1764 of the same code, and does not apply to persons committed to insane asylums under the regulations of the Political Code.

ID.—DISCHARGE FROM INSANE ASYLUM—JURISDICTION OF COURT—HABEAS CORPUS.—No court in this state is authorized to discharge a person who has been committed to an insane asylum, or to restore him to capacity, under any circumstances, except upon writ of *habeas corpus.*

ID.—POWER OF OFFICERS OF ASYLUM.—The power to discharge an inmate of an insane asylum otherwise than upon *habeas corpus* is vested exclusively in the officers of the asylum, and includes the power to determine whether the patient has recovered, and the authority to discharge persons who have sufficiently recovered, and also persons who have been improperly committed.

ID.—EFFECT OF DISCHARGE FROM ASYLUM — RESTORATION TO CAPACITY—RIGHT TO SUE.—The effect of a discharge by the officers of an asylum of an insane inmate, if no guardian has been appointed under the act of March 9, 1885, is, to restore the person discharged to legal capacity to sue.

ID.—MALICIOUS PROSECUTION—COMMITMENT OF SANE PERSON TO ASYLUM.—An action for damages will lie for a malicious prosecution on a charge of insanity, resulting in an order of commitment to an insane asylum of a person who was not insane.

ID.—ORDER OF COMMITMENT—EVIDENCE—PROBABLE CAUSE.—In such action, the order of commitment is not conclusive evidence

against the plaintiff of his insanity at any time, or of probable cause for the prosecution.

REHEARING—PRACTICE.—A rehearing in the supreme court will not be granted in order to consider points not made in the argument upon which the case was originally submitted.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

Chapman Bros., and *J. M. Damron*, for Appellant.

All persons who have reached years of discretion are regarded *prima facie*, by a rebuttable presumption of law, to be sane. (Wharton on Evidence, 2d ed., sec. 1252, and authorities there cited.) Incapacity as a ground of demurrer must appear on the face of the complaint. (Code Civ. Proc., sec. 430.) Insane persons received into the asylum must, upon recovery, be discharged therefrom. (Pol. Code, sec. 2197.) The complaint alleging that the plaintiff was "discharged," he must be presumed to have been so discharged in the proper way. (Code Civ. Proc., sec. 1963, subd. 15.) Under our codes, there are two proceedings provided for with reference to the insane. (Code Civ. Proc., secs. 1763–1766; Pol. Code, secs 2136–2222.)

Wells, Guthrie & Lee, and *Gottschalk & Luckel*, for Respondents.

The averments in the complaint have destroyed the presumption of law as to sanity; for all contracts of a lunatic or person of unsound mind, made after an inquisition and confirmation thereof, are absolutely void, until by permisison of the court he is allowed to assume control of his property. (*L'Amoreux* v. *Crosby*, 2 Paige, 422; 22 Am. Dec. 655; *Wadsworth* v. *Sharpstein*, 8 N. Y. 388; 59 Am. Dec. 499; *Hughes* v. *Jones*, L. R. 5 App. C. 633.) In such cases, the lunacy record, as long as it remains in force, is conclusive evidence of incapacity;

and from the time of the adjudication of insanity until the restoration to reason has been judicially determined, the person declared to be of unsound mind is the ward of the court, and is legally an incompetent person. (*Redden* v. *Baker,* 86 Ind. 195; *L'Amoreux* v. *Crosby,* 2 Paige, 422; 22 Am. Dec. 655; *Wadsworth* v. *Sharpstein,* 8 N. Y. 388; 59 Am. Dec. 499; *Wadsworth* v. *Sherman,* 14 Barb. 169; *Leonard* v. *Leonard,* 14 Pick. 280; *Imhoff* v. *Witmer,* 31 Pa. St. 245; *In re Patterson,* 4 How. Pr. 33; *McCormick* v. *Littler,* 85 Ill. 65; 28 Am. Rep. 610.) Plaintiff's discharge from the asylum is not a restoration to capacity in law. Section 1766 of the Code of Civil Procedure points out the procedure for restoration to capacity, which is by judicial process, and is exclusive.

VANCLIEF, C.—The purpose of this action is to recover from the defendants damages for malicious prosecution of the plaintiff as an insane person, and causing him to be unlawfully arrested and committed to the insane asylum at Stockton. A demurrer to the complaint was sustained by the court. The plaintiff declined to amend his complaint, and final judgment was thereupon rendered against him, dismissing his complaint, and for costs, from which he appeals on the judgment roll.

The grounds of demurrer are, that the complaint does not state facts sufficient to constitute a cause of action; and "that it appears, upon the face of the complaint, that the plaintiff has not the legal capacity to sue herein."

The substance of those parts of the complaint relevant to these grounds of demurrer is as follows: That on January 28, 1889, the defendants willfully, maliciously, unlawfully, and without probable cause, "caused and procured the plaintiff to be arrested and committed to the state insane asylum at Stockton, state of California, on the charge of insanity; that under and by virtue of said commitment plaintiff was unlawfully and against his will detained and imprisoned in said state insane

asylum at Stockton, on said charge of insanity, for and during the period from said twenty-eighth day of January, 1889, up to and including the twentieth day of February, 1889, whereupon said plaintiff was then and there given leave of absence, and afterwards, to wit, April 13, 1889, was discharged; that plaintiff was not on said 28th of January, 1889, or ever, at any other time before or since said day, dangerously insane, or insane at all, nor was he at any of said times so far disordered in his mind as to injure health, person, or property, all of which was known by said defendants before and at the time of said arrest and commitment."

The learned counsel for respondents contend that the demurrer was properly sustained on the ground that the plaintiff had not legal capacity to sue, for the reasons: 1. That it appears, on the face of the complaint, that the plaintiff had been adjudged to be insane on January 28, 1889, by the judge of a court of record pursuant to section 2217 of the Political Code, relating to commitments to the state insane asylums; and 2. That such adjudication is conclusive upon the plaintiff, not only that he was insane at the time he was so adjudged, but that he continued to be insane at the time this action was commenced, unless before that time he had been found to be of sound mind, and capable of taking care of himself and property, as authorized by section 1766 of the Code of Civil Procedure.

It is true that where guardians have been appointed for persons who, by reason of their insanity, imbecility, or habitual drunkenness, are mentally incompetent to manage their property, under statutes in other states similar to article 2, title 11, part 3, of our Code of Civil Procedure, sections 1763–1766, it has been held that an adjudication of such incompetency is conclusive against all persons dealing with the ward, until he is restored to capacity to manage his own affairs by an order of court similar to that authorized by section 1766

of the Code of Civil Procedure. The cases of *Wadsworth* v. *Sharpstein,* 8 N. Y. 388, 59 Am. Dec. 499, and *Imhoff* v. *Witmer's Adm'r,* 31 Pa. St. 243, are fair samples of the strongest cases to this effect. In the latter case the court said: "The object of the statute was protection and guardianship over persons and estates of parties wanting capacity to take proper care of either, and to preserve the property of such from being squandered or improvidently used to their own injury and that of their families, if they have any. It is not necessary to adduce reasons to prove the self-evident propositions that to admit the capacity of control to exist in the lunatic or habitual drunkard over his estate, after inquisition settling his condition in this respect, or submit it to be controverted by evidence of lucid intervals or sobriety at the moment of contracting, would leave the estates of these unfortunate classes about as much exposed as before proceedings had in regard to them. The inquisition and decree standing of record was intended for notice to all the world of the incapacity of the particular party to contract. It is the judgment of the law to this effect, and, as a consequence, his acts in regard to his property are absolutely void while the condition exists."

In the case cited from 8 New York, the court said: "The right of the committee to the custody and control of the property is not superseded during the drunkard's sober intervals; and therefore during such intervals the drunkard has no more authority to deal with or dispose of the property than while he is in a state of intoxication. If it were otherwise, the proceedings would furnish a very ineffectual security against waste and improvidence. Every transaction would be open to litigation upon the question whether it took place while the drunkard was in a state of sobriety or intoxication; and the committee could not execute his trust with safety to himself or benefit to the drunkard or his family."

Those quotations are made merely to show that the

reasons assigned in those cases for holding an adjudication of incompetency conclusive until set aside cannot be applied to the order of a judge in this state committing a person to the state insane asylum under the provisions of the Political Code, although they may be applicable to adjudications of our courts in proceedings had under section 1766 of the Code of Civil Procedure. But whether the reasons assigned in those cases are to be considered sufficient for holding an adjudication of incompetency under section 1766 of the Code of Civil Procedure conclusive against the person adjudged incompetent, until set aside as therein provided, need not be decided in this case, since it seems clear that the proceeding against insane and other mentally incompetent persons, authorized by the Code of Civil Procedure, is entirely distinct from the proceedings authorized by the Political Code for the commitment of insane persons to the state insane asylum.

The provision in section 1766 of the Code of Civil Procedure authorizing the court to restore the person adjudged insane or incompetent to capacity is only applicable to persons adjudged insane or incompetent, and for whom guardians have been appointed under section 1764 of the same code. The application of it to persons committed to the asylums would be utterly inconsistent with the government of those institutions according to the requirements and regulations of the Political Code. After a person has been committed to either of the insane asylums on a charge of insanity, and received into the asylum, no court in this state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person, under any circumstances, except upon writ of *habeas corpus*. The power to discharge him otherwise than upon *habeas corpus* is vested exclusively in the officers of the asylum.

Section 2197 of the Political Code provides: "Insane persons received in the asylums must, upon recovery,

be discharged therefrom." This implies the power to determine whether or not the patient has recovered.

By an act of March 9, 1885, the resident physician is authorized, and it is made his duty, to discharge persons who have been *improperly committed.* (Pol. Code, p. 350.)

By another act of March 9, 1885 (Pol. Code, p. 342), it is provided that the kindred or friends of an inmate of the asylum may apply to the judge who committed him for an order to be directed to the trustees of the asylum for his removal to their custody; and upon their proving that they are capable and suitable to take care of him, and to give protection against his insane acts, the judge may issue the order. But the act further provides that "the trustees shall reject all other orders or applications for the release or removal of any insane person, except the order of a court or judge on proceedings in *habeas corpus.*" (See also a like provision in section 19 of "An act to provide for the future management of the Napa state asylum," approved March 6, 1876. Stats. 1875–76, p. 133.)

It would seem, therefore, not only that the power to discharge an inmate of the asylum is vested solely in the officers of the asylum, but that such power is to be exercised upon one of only two grounds: 1. That the insane inmate has recovered; and 2. That he had been improperly committed. I think the effect of a discharge on either ground, if no guardian had been appointed, under the act of March 9, 1885 (Pol. Code, p. 342), would be to restore the person discharged to legal capacity to sue. A discharge on the first ground is an adjudication, by competent authority, that the person had recovered from insanity; and a discharge on the second ground, by like authority, overrules or nullifies the order of commitment, and leaves the person committed in the same *status,* as to capacity to sue, that he was in before he was committed. (Civ. Code, sec. 40.) Be-

sides, I think the order of commitment is not conclusive evidence against the plaintiff in this action of his insanity at any time, or of probable cause for the prosecution of which he complains. For if it is so, it is difficult to conceive how he is to prove a cause of action which depends upon the truth of his averments, that he was not insane to the degree required by section 2217 of the Poltical Code, or at all, at the time the order was made, and that the prosecution was without probable cause. If he is estopped by the order of commitment from proving these averments, it would seem to follow that no action for a malicious prosecution on a charge of insanity resulting in an order of commitment can be maintained; yet the authorities sanction such actions. (Cooley on Torts, 176 et seq.) That the order of commitment would not thus estop or conclude the plaintiff in a proceding by a writ of *habeas corpus* is obvious; and we have seen that it is not final or conclusive as to the resident physician of the asylum, whose duty it is to disregard it if in his opinion it was not properly made. Indeed, the final determination as to whether the person committed is insane or not is to be made and announced by the resident physician of the asylum. The proceeding before the judge is only preliminary, and is analogous to the preliminary examination of a criminal charge by a magistrate.

As the only ground of demurrer argued here is, that the plaintiff has not the legal capacity to sue, and no particular in which the complaint fails to state a cause of action has been suggested by counsel, or discovered, I think the judgment should be reversed, and the court below directed to overrule the demurrer.

THE COURT.—For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to overrule the demurrer.

A petition for a rehearing having been filed, the following opinion was rendered thereon on the 17th of January, 1891:—

The COURT.—In submitting this case for decision, respondents argued but a single point raised by their demurrer to the appellant's complaint.

We considered that objection, and decided it correctly.

In their petition for a rehearing, other objections to the complaint are called to our attention. But we have decided—and with manifest propriety—that we will not grant a rehearing in order to consider points not made in the argument upon which the case was originally submitted.

A respondent whose demurrer has been sustained by the superior court ought to fairly present in this court every objection upon which he relies.

We cannot be expected to scrutinize the record for the purpose of discovering points which counsel have not taken the trouble to specify.

Rehearing denied.

[No. 13902. Department One.—December 19, 1890.]

IN THE MATTER OF THE ESTATE OF FRANCIS R. BABY, DECEASED.

APPEAL—DISMISSAL—DECREE OF DISTRIBUTION — SATISFACTION OF JUDGMENT.—When a judgment has been satisfied it has passed beyond review; and an appeal from a decree of distribution will be dismissed, where it appears that the appellants had received payment in full of the distributive shares allotted to them by the decree.

JUDGMENT—PAYMENT—FINAL DISCHARGE.—Payment of a judgment produces a permanent and irrevocable discharge; after which the judgment cannot be restored by any subsequent agreement, nor kept on foot to cover new and distinct engagements.

MOTION to dismiss an appeal from a decree of distribution of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

Galpin & Zeigler, for Appellants.

The decree is in the appellants' favor for a certain amount, for which they have receipted. After this receipt they appeal for a modification of the decree, which, as to a lapsed legacy, was clearly erroneous. A receipt under such circumstances is not a waiver of their right of appeal. (*Clowes* v. *Dickenson,* 8 Cow. 330; *Higbie* v. *Westlake,* 14 N. R. 288; *Benkard* v. *Babcock,* 2 Rob. (N. Y.) 175–178; *Meaders* v. *Gray,* 60 Miss. 400; 45 Am. Rep. 414; *Clifft* v. *Wade,* 51 Tex. 14; *Erwin* v. *Lowry,* 7 How. 172, 183, 184; *Wheeler* v. *Catlin,* 44 Wis. 464; *Catlin* v. *Wheeler,* 49 Wis. 522–524.) While the fact that the order of discharge has been made may affect the right to proceed against the administrator, it cannot, in case of a modification of the decree, bar the bringing of an action in *assumpsit* against the co-legatee, who has received more than her share of the property. (*Sholey* v. *Halsey,* 72 N. Y. 578; *Crane* v. *Runey,* 26 Fed. Rep. 15.)

Page & Eells, and *Pillsbury & Blanding,* for Respondents.

The judgment became a dead record when it was satisfied, which satisfaction was made before the appeal was taken. (*Moore* v. *Floyd,* 4 Or. 260; *Cassell* v. *Fagin,* 11 Mo. 208; 47 Am. Dec. 151.) The judgment, being satisfied, has passed beyond review. (*People* v. *Burns,* 78 Cal. 645–647; *Morton* v. *Superior Court,* 65 Cal. 496–498.) The right to proceed on a judgment or decree, and enjoy its fruits and the right of appeal, are not concurrent, but inconsistent, and consequently a party accepting the benefit of a judgment or decree is estopped to appeal from it. (*Morgan* v. *Ladd,* 7 Ill. 414–416; *Murphy* v. *Murphy,* 45 Ala. 123–125; *Fly* v. *Bailey,* 36 Tex. 119; *Alexander* v. *Alexander,* 104 N. Y. 643; *Knapp* v. *Brown,* 45 N. Y. 207; *Hall* v. *Lacy,* 37 Pa. St. 366; *Smith* v. *Jack,*

2 Watts & S. 101; *Holt* v. *Reid,* 46 Ill. 181–183; *Corwin* v. *Shoup,* 76 Ill. 246–249; *Altoona* v. *Delaware,* 44 Iowa, 201; *Borgalthous* v. *Ins. Co.,* 36 Iowa, 250–252; *Campbell* v. *Orillion,* 3 La. Ann. 115; *Lamprey* v. *Henk,* 16 Minn. 362–364; *Garner* v. *Garner,* 38 Ind. 139, 140; *Pulling* v. *Supervisors,* 3 Wis. 304–308.) The exceptions to this rule, which have been recognized by some courts, seem to rise where a party is obliged to do something in the way of payment, in order to get into a position to appeal, accepting no benefit, but merely doing what the judgment compels, or where he is prosecuting an appeal which does not involve a reversal of that part of the judgment or decree under which he takes the money. (*Coggswell* v. *Colley,* 22 Wis. 381, 382; *Kelly* v. *Bloom,* 17 Abb. Pr. 229–231; *Bennett* v. *Van Syckel,* 18 N. Y. 481–484.)

The COURT.—The respondents have moved to dismiss the appeal herein on two grounds, viz.: 1. The judgment was satisfied by the appellants before the appeal was taken; 2. Notice of appeal was not served on Gibbs, one of the distributees.

The decree of distribution was entered March 24, 1890, and the notice of appeal was served May 12, 1890. On the eleventh day of April, 1890, there were filed in the court below two receipts, signed by the appellants, in which they respectively acknowledged that they had received from the administrator certain sums of money and personal property, *in full of the distributive shares of the said estate allotted to them in and by the decree of distribution therein entered March 14, 1890.*

When a judgment has been satisfied, it has passed beyond review; for the satisfaction thereof is the last act and end of the proceeding. (*Morton* v. *Superior Court,* 65 Cal. 496; *People* v. *Burns,* 78 Cal. 645.) "Payment produces a permanent and irrevocable discharge; after which the judgment cannot be restored by any subse-

quent agreement, nor kept on foot to cover new and distinct engagements." (Freeman on Judgments, sec. 466; *Moore* v. *Floyd,* 4 Or. 260; *Cassell* v. *Fagin,* 11 Mo. 208; 47 Am. Dec. 151.)

We are unable to say, from the record, that the rights of Gibbs would not be affected by a reversal of the decree; and in view of what has been said upon the first ground of the motion, it is unnecessary for us to pass upon the question whether it was necessary that he should be served with a notice of appeal.

The motion to dismiss is granted.

[No. 13783. Department Two.—December 19, 1890.]

J. M. MARTIN, APPELLANT, *v.* JAMES F. MORGAN, RESPONDENT.

VENDOR AND PURCHASER—CONTRACT OF SALE—TIME, WHEN OF ESSENCE OF CONTRACT.—A stipulation in a contract for the conveyance of land, to the effect that the vendor would convey within sixty days from the date thereof upon condition that the final payment of the purchase-money should be made within said time, otherwise the "agreement to be null and void," shows a clear intention to make time the essence of the contract; and a failure by the vendees or their assignees to make the payment due, within the time fixed, avoids the contract.

ID.—INTENTION OF PARTIES—PROVISION AVOIDING CONTRACT.—The intention of the parties to make time the essence of a contract must govern, and no particular form of stipulation is necessary, but any clause will have that effect which clearly and absolutely provides that the contract is to be void, if the fulfillment is not within the prescribed time.

ID.—UNILATERAL CONTRACT—POSSESSION OF VENDEE—SPECIFIC PERFORMANCE—FAILURE TO TENDER PURCHASE-MONEY IN TIME LIMITED.—When time is made of the essence of a unilateral contract to convey land upon payment of the purchase-money within a definite period, the fact that the vendee entered into possession of the land, plowed, surveyed, and platted it into lots, without making any other improvements thereon, will not entitle him to a specific performance of the contract, if he has failed to tender the purchase-money within the time limited.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Church & Cory, for Appellant.

There was both taking possession of the land and part payment of the price, and the failure on the part of the court to find upon the question of possession is prejudicial error. (Pomeroy on Specific Performance, secs. 375, 381.) The general rule of equity is, that time is not of the essence of the contract. (*Janes* v. *Throckmorton,* 57 Cal. 381.) In order that it be essential, the intent to make it so must be most clearly, unequivocally, and unmistakably shown by the stipulation. (Pomeroy on Specific Performance, sec. 392.) The concluding words of the contract are merely formal,—in the ordinary form of a bond,—and this does not make time of the essence of the contract. (*Jones* v. *Robbins,* 29 Me. 351; 50 Am. Dec. 593.) Whatever be the form of expressing it, the intention of the parties to make time essential must be unequivocally declared. (Pomeroy on Specific Performance, sec. 302, and cases cited in foot-note.) Appellant had taken possession of the land, plowed, mapped, and platted it, put it in a condition for sale, and, at least, respondent had acquiesced in the delay; respondent could not therefore elect to rescind the contract without restoring, or at least offering to restore, to appellant what he had received thereon. (Pomeroy on Specific Performance, sec. 393; Civ. Code, sec. 1691; *Wilson* v. *Sturgis,* 71 Cal. 226; *Bohall* v. *Diller,* 41 Cal. 535; *Henderson* v. *Hicks,* 58 Cal. 364; *Keller* v. *Lewis,* 53 Cal. 113.)

Sayle & Coldwell, for Respondent.

The time for the performance of a written contract for the conveyance of real property cannot be extended by an unexecuted oral agreement. (Civ. Code, secs. 1698, 1624; *Smith* v. *Taylor,* 82 Cal. 533.) The taking possession by plaintiff's assignors, under the contract, was not a material issue in the case; the contract did not

provide that plaintiff's assignor might take possession; it is silent as to possession. (*Gates* v. *McLean,* 70 Cal. 49.) It is not the taking possession under a written contract that is material; it is the keeping of possession after a failure to pay by the vendee that is in some cases material; but it is not a material ultimate fact, but it is simply evidentiary matter, going to rebut a presumption that the contract has been abandoned. (Pomeroy on Specific Performance, sec. 375.) The condition in the contract was a condition precedent, and not a condition subsequent; and it was the intention that no right under the contract should vest until after full payment. (Pomeroy on Specific Performance, secs, 379, 390, 393, and notes on pages 462, 463, 464, 465.) This is a unilateral contract. If the vendor agrees to convey if payments be made at or before a given date, or if an option is given which is to be accepted by payment within a given time, then the time of payment is certainly essential. (Pomeroy on Specific Performance, sec. 387, and note.)

SHARPSTEIN, J.—This is an action to compel specific performance of a unilateral contract, by which the respondent agreed to convey to appellant's assignors a certain tract of land at any time within sixty days from the date of said contract, upon the following express conditions: The said assignors to pay to respondent $150 of the purchase-money down on the delivery of said contract, and the balance within sixty days from the date thereof, otherwise said agreement to be null and void. One hundred and fifty dollars was paid on the delivery of the contract, but the balance of the purchase price, to wit, $4,850, was not paid or tendered within sixty days from the date of said contract. As an excuse for not paying said balance within said sixty days, the plaintiff in his complaint alleges that before the expiration of said sixty days from the date of said contract, the defendant, for a valuable consideration, extended the time of performance on the part

of his assignors to a reasonable time after the expiration of said sixty days. The court found that the defendant never extended the time for the performance of the conditions expressed in said agreement, or for the payment of any money stipulated to be paid as balance of the purchase price of said land, and rendered judgment in favor of the defendant. From that judgment, and the order overruling his motion for a new trial, this appeal is prosecuted by the plaintiff. We cannot say that the finding, of which we have above given the substance, was not justified by the evidence. We shall therefore consider the case as we would were there no claim made of an extension of the time specified in the written contract for the payment of the deferred payment. As before stated, plaintiff's assignors agreed to pay defendant $150 of said purchase-money down upon the delivery of the agreement, and the balance within sixty days from the date thereof (August 31, 1887), *otherwise the agreement to be null and void.* Neither plaintiff nor his assignors performed, or offered to perform, the conditions expressed in said agreement within sixty days from the date thereof, and said agreement was not assigned to plaintiff within sixty days from the date thereof. The court finds that the plaintiff, after the assignment of said agreement to him, offered to pay and tendered all the balance of the purchase-money required to be paid by said agreement.

No other excuse or reason than the one above stated is alleged in the complaint, by plaintiff or his assignors, for non-performance of the condition expressed in the contract. The plaintiff alleges that upon the delivery of said contract to his assignees they entered into the possession of said land, and expended the sum of $270 in valuable improvements. The court finds: "That said M. J. and P. B. Donahoo (plaintiff's assignees) accepted said agreement and paid said sum of $150, and plowed said land, surveyed, mapped, and platted it into lots, but

did not expend any sum of money whatever in the improvement of said real property." This finding is justified by the evidence introduced by the plaintiff as to what his assignors did upon the land, although one of the witnesses stated that the expense of the plowing was thirty dollars. We are not prepared to hold that what was done upon the land constituted an improvement.

We think the finding last above quoted is a sufficient finding that plaintiff's assignor entered into possession of said land at the time alleged in plaintiff's complaint.

The precise time at which plaintiff tendered the deferred payment provided for in the contract does not appear. But the court finds that he took an assignment of the contract after the time of making said payment had expired, and that after he had received such assignment he offered to pay all of the balance of the purchase-money due thereunder.

This brings us to what we deem the principal question in the case. Was time made the essence of this contract? In other words, is the intent to make it so clearly, unequivocally, and unmistakably shown by the stipulation? The defendant's stipulation was, that he would convey at any time within sixty days from the date of said agreement upon certain express conditions, one of which is, that the final payment of the purchase-money should be made within sixty days from the date of said agreement, otherwise the "*agreement to be null and void.*"

The contention of appellant's counsel that the general rule of equity is, that "time is not the essence of the contract," is not supported by any modern authority. The general rule, as expressed by Parsons on Contracts, and by this court in *Grey* v. *Tubbs,* 43 Cal. 359, is, that "time is not necessarily the essence of a contract." But it may be made so. Professor Pomeroy says: "It is now thoroughly established that the intention of the parties must govern; and if the intention clearly and unequivocally appears, from the contract, by means of some ex-

press stipulation, that time shall be essential, the time of completion or of performance or of complying with the terms will be regarded as essential in equity as much as at law. No particular form of stipulation is necessary, but any clause will have the effect which clearly and absolutely provides that the contract is to be void if the fulfillment is not within the prescribed time." (Pomeroy on Specific Performance, 462.) Among the numerous cases cited by the learned author in support of this doctrine is that of *Benedict* v. *Lynch,* 1 Johns. Ch. 370, 7 Am. Dec. 484, decided by Chancellor Kent. In that case the contract was signed by the defendant only, and he agreed to give a deed upon certain express conditions being performed by the plaintiff at the specified times, "but if he should fail in them, or either of them, the agreement to be void." The plaintiff failed to perform within the time specified, but offered to, after the expiration of that time. The opinion of the learned chancellor is the most full and satisfactory explanation of the question involved in this case that has ever fallen under our observation, but we deem it unnecessary to quote more from it than the following: "There was an express stipulation in this contract that if *the plaintiff failed in either of his payments, the agreement was to be void.* The first question which naturally presents itself is, whether the time was not here made part of the essence of the contract, and whether the contract did not become void on the failure of the plaintiff to make the first payment." He held that it was, and decreed accordingly. In that case the intention of the parties to make time the essence of the contract did not more clearly and unequivocally appear than it does in this case. *Grey* v. *Tubbs,* 43 Cal. 359, is in the same line as *Benedict* v. *Lynch.* In *Grey* v. *Tubbs* this court said: "Courts of equity have not the power to make contracts for parties, nor to alter those which the parties have deliberately made; and whenever it appears that the parties have *in fact* contracted that if the pur-

chaser make default in the payments as agreed upon he shall not be entitled to a conveyance, and shall lose the benefit of his purchase; and when it also appears that the purchaser is without excuse for his delay, the courts will not relieve him from the consequences of his default."

Judgment and order affirmed.

THORNTON, J., and MCFARLAND, J., concurred.

[No. 12044. Department One.—December 20, 1890.]

CHARLES FORD ET AL., RESPONDENTS, *v.* JAMES F. CUNNINGHAM ET AL., APPELLANTS.

EVIDENCE—PRESS COPIES OF LETTERS.—Press copies of letters are the best evidence, next to the originals themselves; and where such copies are shown to exist, it is error to allow oral evidence as to their contents.

ACTION AGAINST PARTNERSHIP—SALE TO INDIVIDUAL PARTNER—EVIDENCE—BOOKS OF ACCOUNT.—Where a partnership is sued for barley sold to one of the firm individually, the account-book of the copartnership, admitted to be a book containing original entries, and showing that there was no item of barley in the account of the defendants with the plaintiffs, is admissible in evidence, in connection with the testimony of one of the partners that the book showed the true state of accounts between the plaintiffs and the defendants, and that the items therein contained had been entered at the time of the several transactions therein mentioned.

APPEAL from a judgment of the Superior Court of Santa Cruz County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Garber, Boalt & Bishop, J. M. Lesser, and *Spalsbury & Burke,* for Appellants.

A. S. Kittredge, for Respondents.

The COURT.—The only question litigated in the court below was, whether the barley was sold by the plaintiffs

to the defendant Cunningham, or to the firm of Cunningham & Co., of which he was a member.

The appellants contend that the evidence is insufficient to support the findings, but we think there was sufficient evidence on behalf of the defendants to create a substantial conflict, and under the well-established rule we should not interfere with the findings of fact.

The plaintiffs, to establish their case against the copartnership, relied mainly on documentary evidence, some of which they claimed was in possession of the defendants, who were asked, at the trial, to produce the same.

Mr. Morey, one of the plaintiffs, was permitted by the court to state the contents of certain bills and letters which he claimed had been addressed and sent to Cunningham & Co. Objection was made by the defendants to the introduction of oral testimony as to the contents of the bills and letters, and the objection was overruled. We think the court erred in its ruling. The witness stated that he had no personal knowledge that the communications addressed to Cunningham & Co. were mailed, except that copies thereof appeared in the plaintiffs' copy-book, and that it was a general custom of his firm to place letters in a box in the store, from which they were taken to the post-office. No foundation, therefore, was laid for the introduction of the evidence. Assuming that secondary evidence could, under such circumstances, be introduced, the press copies were the best evidence, next to the originals themselves. The ruling was on a material matter, because the defendants testified that they never received the communications referred to. (*Brailsford* v. *Williams,* 15 Md. 150; 74 Am. Dec. 562.)

Mr. Middleton, one of the defendants, was called as a witness, and identified the ledger of the copartnership, showing the account of Ford & Co. with Cunningham & Co. from September 1, 1884, to the date of trial. It

was admitted by the plaintiffs that the entries therein were original entries, but they objected to the introduction of the same as evidence, on the ground that it was irrelevant, immaterial, and incompetent. The objection was sustained by the court, to which ruling the defendants excepted. There was no item of barley in the account offered. The ruling, we think, was error. The witness had stated that the ledger showed the true state of account between plaintiffs and defendants, and that the items had been entered by him at the time of the several transactions therein mentioned. (*Landis* v. *Turner*, 14 Cal. 573.)

Judgment and order reversed, and cause remanded for a new trial.

Hearing in Bank denied.

[No. 11740. Department One.—December 20, 1890.]

IRA GRAY, RESPONDENT, *v.* JOHN I. SABIN, APPELLANT.

VACATION OF JUDGMENT—ABSENCE OF ATTORNEY FROM TRIAL—MISTAKE AND EXCUSABLE NEGLECT—TRIAL IN ANOTHER COUNTY—AGREEMENT FOR DISMISSAL.—A motion to set aside a judgment for the defendant, upon the alleged ground of mistake and excusable neglect of plaintiff's counsel in failing to attend the trial, should be denied, where it appears that the cause was regularly set for trial by consent of parties, and had been continued for several days for the convenience of plaintiff's counsel and for the dispatch of other business, and that the plaintiff's counsel again voluntarily absented himself, without an agreement or order for further continuance, to attend a trial in another county, and that he had promised the defendant to dismiss the case.

ID.—MOTION TO SET ASIDE ORDER—ABSENCE OF ATTORNEY AS WITNESS.—A motion of the defendant to set aside an order vacating the judgment, upon plaintiff's motion, should be granted, where it appears that the attorney for plaintiff absented himself from the trial to attend a trial in another county, not as an attorney, but solely as a voluntary witness, without subpœna.

APPEAL from an order of the Superior Court of the City and County of San Francisco vacating a judgment,

and from an order refusing to vacate the order setting aside the judgment.

The facts are stated in the opinion of the court.

Pillsbury & Blanding, for Appellant.

Robert Ash, for Respondent.

The COURT.—This cause came regularly on for trial, having been set, by consent of all parties, on November 25, 1885. Counsel for plaintiff was absent. His clerk stated that he was unavoidably detained in Los Angeles, and asked for a continuance. The defendant objected to a continuance, but as there was another cause on trial, and as the next day was Thanksgiving Day, the court put the case over until Monday, November 30th. On the latter day, and the day following, the cause was called for trial, and the defendant answered ready. On December 2d, other business having been disposed of, the court ordered the case to proceed. The clerk again appeared on behalf of the attorney for plaintiff, and stated that said attorney was in Modesto, trying a case, although he had returned from Los Angeles to San Francisco since November 25th. Defendant objecting to a continuance, the court ordered the trial to proced, a jury was impaneled, and no evidence having been offered on behalf of the plaintiff, a verdict was rendered for the defendant.

On December 10, 1885, the plaintiff served notice of motion to vacate judgment, on the ground that it was taken against him through his mistake and excusable neglect. In support of his motion, he presented an affidavit of merits, which also alleged that he expected his attorney to be present at the trial, that he was too poor to employ other counsel to take his place, and that he believed his attorney was actually engaged in another court in the trial of a cause. His counsel made affidavit

that, although he had returned to San Francisco on November 29th, he had, several months prior, engaged to be in Modesto to attend the trial of a cause there, set for November 23d, and afterwards continued to November 30th; that he was informed on his return to San Francisco, November 30th, this cause could not be reached for several days, on account of other business before the court, and that it was a custom of this court to continue causes for the convenience of counsel engaged in other courts. Counter-affidavits were filed, on behalf of the defendant, alleging that there was no custom under which causes were continued for the convenience of counsel engaged in the courts of outside counties; that counsel for plaintiff had long before agreed to dismiss this cause. J. L. Boone, a partner of the attorney for plaintiff, who was absent in Modesto at the time of the trial, corroborated the defendant in his statement as to the promise of a dismissal.

A clerk in the office of the attorneys for defendant stated that he had informed the attorney for plaintiff as to the day of the trial, and said attorney stated that he would not be present, that he was going to Los Angeles, and asked for a continuance, which the clerk said he had no authority to grant.

The court granted the motion of the plaintiff, and set aside the judgment.

Thereafter the defendant moved the court to set aside its order vacating the judgment, on the ground that it had been deceived in matters of fact by the affidavits filed on the application to vacate the judgment, which motion was denied, and defendant has appealed.

It was made to appear—indeed, the fact was not disputed—that the attorney of the plaintiff attended a trial at Modesto, not in the capacity of an attorney, but as a witness; that he was not subpœnaed, but attended voluntarily; that he left Moresto before the trial of said cause was completed, having been permitted to give his

testimony out of the regular order, so that he might return to San Francisco.

We think that, under the showing made on the first application, the motion to set aside the judgment ought to have been denied; and certainly, on the showing made to vacate the order, the defendant was entitled to have it set aside, and to have the judgment stand on the verdict of the jury. If such excuses as were offered in this case were held sufficient to set aside judgments, there would be no end to delays and annoying expedients.

The orders appealed from are reversed.

[No. 13969. Department One.—December 20, 1890.]

A. J. GILLIS ET AL., RESPONDENTS, *v.* DANIEL CLEVELAND, APPELLANT.

STREET IMPROVEMENT — ASSESSMENT — LIEN UPON LOTS—FORECLOSURE—SEVERAL RIGHT OF ACTION—FORMER RECOVERY—PLEA IN BAR.—Under the act of March 18, 1885 (Stats. 1885, p. 147), providing for the assessment of abutting lots for the expenses incurred for street improvements, and that the amount assessed upon each lot shall be a lien thereon, each lot or portion of a lot is separately liable for its proportion of the cost of the improvement, and the liability of each is independent of any other, and constitutes a separate demand upon which a separate cause of action may be based, and the foreclosure of a lien upon one lot is not a bar to an action to foreclose a lien upon another lot owned by the same person.

ID.—PERSONAL LIABILITY.—The expense of the improvement is a lien upon the property benefited, and not a charge against the owner personally.

ID.—ATTORNEY'S FEES — ALLOWANCE AGAINST EACH LOT.—Under section 12 of such act, allowing a certain amount as an attorney's fee, in addition to the taxable costs, in all cases of recovery under the provisions of the statute, the fee may be allowed as against each lot, although owned by the same person.

ID.—RECORD OF WARRANT OF ASSESSMENT.—A warrant of assessment must, in order to create a lien upon the property charged, be recorded in the office of the superintendent of streets before it is delivered to the contractor or his assigns.

ID.—OMISSION OF NAME OF MAYOR FROM RECORD.—Where the warrant of assessment was properly signed by the superintendent of streets, and countersigned by the mayor, the fact that the name of the mayor and the designation of his office were omitted from the record by the superintendent does not render the recording ineffectual.

APPEAL from a judgment of the Superior Court of San Diego County.

The facts are stated in the opinion.

Luce, McDonald & Torrance, for Appellant.

Hunsaker, Britt & Lamme, for Respondents.

GIBSON, C.—This action was brought to foreclose a street-assessment lien for the grading of Logan Avenue, in the city of San Diego.

The defendant, in his answer, put in issue some of the material allegations of the complaint, and as one of his affirmative defenses set up a former recovery in another action between the same parties. This plea in bar was, upon plaintiffs' motion, stricken out; and upon the trial subsequently had before the court without a jury, judgment was rendered for the plaintiffs, from which the defendant appeals.

Appellant's counsel maintain that the court erred in striking out the plea in bar.

The property affected in the former action was lot 2, in block 179, of Manassee and Schiller's addition to the city; while in this action it is lot 9 in the same block. They both were and are owned by the defendant, and front on Logan Avenue, and were both assessed for the same grading, which was let as a single contract by the city to the plaintiffs, who performed the work. The latter brought a separate action against the defendant as to lot 2, and obtained a judgment, which appears to have been satisfied. And it is now claimed that as that judgment was rendered in an action upon the same assessment, which constituted but one entire demand, it

was a recovery upon a portion of such demand, and is good as a plea in bar of the present action.

But we think an examination of the act of March 18, 1885 (Stats. 1885, p. 147), under which the improvement and assessment were made, will show that the rule invoked by the appellant has no application here.

It is provided in the first subdivision of section 7 of that act that the expenses incurred for any work authorized by the act "shall be assessed upon the lots and lands fronting thereon; . . . . each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expenses of the work."

And section 8 provides that "after the contractor of any street-work has fulfilled his contract to the satisfaction of the street superintendent of the said city, or city council on appeal, the street superintendent shall make an assessment to cover the sum due for the work performed and specified in said contract (including any incidental expenses)." This assessment shall show, among other things, "the amount of each assessment, the name of the owner of each lot, or portion of a lot (if known to the street superintendent); if unknown, the word 'unknown' shall be written opposite the number of the lot, and the amount assessed thereon, the number of each lot or portion of a lot assessed, and shall have attached thereto a diagram exhibiting . . . . the relative location of each distinct lot or portion of a lot to the work done," etc. Section 9 provides that a warrant signed by the superintendent of streets, and countersigned by the mayor of the city, shall be attached to the assessment. The warrant, assessment, and diagram must then be recorded in the office of the superintendent of streets. "When so recorded, the several amounts assssed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged. . . . .

After said warrant, assessment, and diagram are recorded, the same shall be delivered to the contractor, or his agents or assigns, on demand; . . . . and by virtue of said warrant, said contractor, or his agents or assigns, shall be authorized to demand and receive the amount of the several assessments made to cover the sum due for the work specified in such contracts and assessments."

Thus it appears that the expense of the improvement is a charge upon the property benefited, and not a charge against the owner personally. In furtherance of this end, the identity of the lot assessed, and not the person who may be the owner, is made the essential requirement of the statute, the first must be specifically described, while the latter may be designated as "unknown," as in the present case. Nowhere in the statute does any intention appear to charge the owner personally.

In *Taylor* v. *Palmer,* 31 Cal. 241, it was held that in cases of this character the owner could not be made personally liable for the proportion of the exercise of the improvement assessed against his property. And in *Dyer* v. *Barstow,* 50 Cal. 652, it was held that there was no privity of contract between the owner and the person who contracted with the city to do the work.

It is to be observed that the several assessments which the contractor is authorized to demand and receive are the particular assessments against each lot or portion of a lot. He is not empowered, in cases where a person owns two or more lots liable for their proportion of the cost of the improvement, to demand the sum of the several assessments against two or more lots, but must make a several demand as to each lot. Thus in a case like the one here, where a demand was made upon the premises assessed, as may now be done where the owner named in the assessment, or his agent, cannot conveniently be found, and which must be done whenever the name of the owner is stated as unknown (Act of 1885, p. 147, sec. 10), a demand upon each of two lots for the

sum of the assessments due upon both was held to be bad, and insufficient to support a recovery. (*Schirmer* v. *Hoyt,* 54 Cal. 280.)

Again, in the same section of the act last referred to, the assessment against each lot is treated as a separate and distinct demand; for the superintendent of streets "may release any assessment upon the books of his office, on the payment to him of the amount of the assessment against any lot, with interest, or on the production to him of the receipt of the party, or his assigns, to whom the assessment and warrant were issued." And by section 12, when suit is brought: "The court in which such suit shall be commenced shall have power to adjudge and decree a lien against the premises assessed, and to order such premises to be sold on execution, as in other cases of the sale of real estate by the process of said courts." It is obvious that the lien here referred to is one for the particular amount assessed against each lot, and not the whole amount of several assessments against all the lots of one owner, without regard to the proportion properly chargeable to each. Thus in *Brady* v. *Kelly,* 52 Cal. 372, it was said: "Where two or more lots are assessed for the expenses of work on a street, each lot is chargeable only with the amount assessed upon it, and not for the amount assessed against another lot; and in enforcing the lien of the assessment, the judgment should state the amount for which each lot is liable, and should order a sale of each lot, or so much thereof as may be necessary to satisfy such amount and costs."

We therefore think it manifest that each lot, or portion of a lot, is separately liable for its proportion of the cost of the improvement, and that the liability of each is independent of any other, and constitutes a separate demand, upon which a separate cause of action may be based. And since this is so, the recovery as to lot 2, in the former action, although between the same parties, was not upon the same, but a different, cause of action,

and therefore was not good as a plea in bar of this action, and was for that reason properly stricken out.

What we have said on this point also disposes of the suggestion regarding the allowance of fifteen dollars, as an attorney's fee, in addition to taxable costs, in all cases of recovery under the provisions of the statute. (Act of 1885, p. 147, sec. 12.) For it necessarily follows that if the charge against each lot or portion thereof is a separate and distinct demand, that the attorney's fee, prescribed by section 12, may be allowed in each case. And in response to appellant's argument regarding this burden, it may be proper to add that such burden may be escaped by paying for the improvement before suit is brought.

The appellant further maintains that the judgment is not sustained by the findings, since it appears from the latter that the warrant issued to the plaintiffs was never recorded in the office of the superintendent of streets. As already shown, a warrant of the character of the one in question must, in order to create a lien upon the property charged, be recorded in the office of the superintendent of streets before it is delivered to the contractor or his assigns. (Act of March 18, 1885, sec. 9. See *Himmelmann* v. *Danos,* 35 Cal. 450; *Himmelmann* v. *Bateman,* 50 Cal. 11; *Norton* v. *Courtney,* 53 Cal. 691.)

The findings here disclose that the warrant, which was properly signed by the superintendent of streets, and countersigned by the mayor, was recorded in the office of the first-mentioned officer, but that the name of the mayor, and the designation of his office, viz., "W. J. Hunsacker, Mayor," were omitted from the record. And this omission, it is claimed, made the recording ineffectual. In *San Francisco* v. *Certain Real Estate,* 50 Cal. 188, which was an action *in rem* to enforce a street assessment, the duplicate assessment roll required to be made under section 7 of the act of February 1, 1870, amendatory to the act of March 30, 1868 (Stats. 1869–

70, p. 41), did not contain the certificate of the mayor, which was appended to the original assessment roll. This omission, on the trial, was held to be immaterial, and on sustaining the ruling on appeal, this court said: "It appears, in the record, that the original roll was duly made and properly certified by the mayor, who delivered it to the auditor; but in making the duplicate for the collector, the auditor omitted therefrom the certificate of the mayor. The court below held the omission to be immaterial, and we agree in that opinion."

So here, the record shows that the warrant was properly signed and countersigned; but that the superintendent of streets, in recording it in the record-book, in his office, failed to copy the name and official designation of the mayor. We can see no difference in principle between this case and the one quoted from. The original warrant here was authenticated, as the original assessment roll was there, in the manner required by law, and the omission of the mayor's certificate from the duplicate of the original assessment roll in the latter case was deemed immaterial. And we think the omission complained of here is of the same character. This defect is not the same as those held to be fatal in *Himmelmann* v. *Bateman,* 50 Cal. 11, and *Norton* v. *Courtney,* 53 Cal. 691. In each of those cases the omission from the record was an essential part of the description of the premises against which the lien was sought to be enforced. In the first, the depth of the lot was, by mistake, omitted from the diagram; and in the second, the arrow showing the courses on the diagram was, in like manner, omitted. (Compare this last case with *Whiting* v. *Quackenbush,* 54 Cal. 306.) These omissions were fatal, because they rendered it impossible, in either case, to identify the property from the record. In *Himmelmann* v. *Danos,* 35 Cal. 450, which is to the same effect, the record of the assessment and diagram and warrant was held to be no record at all, because the same was not certified

to by the superintendent of streets, or by any one for him.

This disposes of the appellant's argument, and finding no error in the record, we think the judgment should be affirmed.

BELCHER, C. C., and VANCLIEF, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

Hearing in Bank denied.

[No. 13973. Department Two.—December 20, 1890.]

A. E. D. SCOTT, RESPONDENT, *v.* G. R. G. GLENN, APPELLANT.

MONEY HAD AND RECEIVED—CONTRACT OF SALE—PAYMENT OF PURCHASE-MONEY—NONSUIT.—In an action for money had and received, a nonsuit should be granted where the plaintiff's evidence merely shows that the money was paid as part of the purchase price of land under a contract which provided that the money was paid upon the express condition that it was not to be returned, but was to be forfeited unless further payments of the purchase price were made within a definite period.

ID.—VENDOR AND PURCHASER—CONTRACT OF SALE—AGENCY—RATIFICATION—ESTOPPEL—RECISSION BY PURCHASER.—Where one of the vendors named in the contract of sale signed his own name and that of the other vendor, whose agent he was, and the other vendor ratified the signature, and joined in demanding the purchase-money and in tendering a deed of the land, in compliance with the contract, the latter is estopped from defending against the contract, and the purchaser cannot plead the agent's want of authority as a ground for repudiating the contract and recovering back the purchase money paid.

ID.—EXECUTED CONTRACT—RECOVERY OF PURCHASE-MONEY PAID.—An attempt to recover part of the purchase-money paid under the contract of sale is an attempt to undermine an executed contract, and the purchaser cannot invoke, in favor of such action, principles which apply to actions for the enforcement of executory contracts.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Meux & Edwards, and *Thompson & King,* for Appellant.

T. P. Ryan, for Respondent.

MCFARLAND, J.—This is an appeal by defendant from a judgment against him for six hundred dollars, and from an order denying a new trial.

The complaint merely avers that on April 4, 1888, defendant was indebted to plaintiff and certain other named persons in the sum of six hundred dollars for money had and received for the use and benefit of said persons; that the others assigned said indebtedness to plaintiff; and that no part of the same has been paid. The answer specificially denies all the averments of the complaint. There is also a cross-complaint, in which defendant avers that on said April 4, 1888, he and one Meux, being the owners of certain described lots of land, contracted, in writing, with plaintiff and certain other persons to sell them the said lands for one thousand eight hundred dollars,—six hundred dollars in cash, and the balance in two equal payments in six and twelve months; that the six hundred dollars sued for was the first cash payment on said contract; that plaintiff and said other persons went into possession of the land under said contract; that when the other payments became due, defendant and said Meux demanded payment, and tendered a good and sufficient deed of conveyance of said land, but that plaintiff and said other persons refused to pay or to accept the deed, and that said Meux assigned all his right to defendant. The prayer of the cross-complaint is, that he recover judgment against plaintiff and said other parties for said deferred payments, and for the enforcement of a lien on said land. The answer of the plaintiff, Scott, and others, to the cross-complaint, first denies, in terms, that there was any such contract in writing; but it admits that there was such a verbal contract, that the six hundred dollars

was paid thereon, and that "then and there" the said Glenn and Meux executed, in writing, a receipt and memorandum of said contract, in words and figures as follows:—

"Received of Scott, Cutten [and others named], six hundred dollars, one third of purchase price of lots Nos. [describing the lots], leaving a balance of twelve hundred dollars, in gold coin, due on said purchase, which, by the terms of this sale, is to be paid in two equal payments, together with interest at the rate of ten per cent. per annum on the whole of said unpaid purchase price, at the maturity of each installment, till paid in like coin, within six and twelve months from date hereof. If paid as above stated, the above-named Scott, Cutten . . . . will be entitled to a deed of the above-described lots; otherwise this agreement becomes void, and all payments made hereon shall be forfeited.

("Signed) J. T. MEUX and G. R. G. GLENN."

The answer denies that they went into possession. It does not contain any sufficient denial of the tender of a deed, as averred in the cross-complaint. Neither does it aver that Glenn and Meux had no title, or could not make a valid conveyance of the lots; the only averment on that subject being that "at no time have the said Meux and Glenn shown to defendants, or either of them, that they, the said Meux and Glenn, had good title to said lots." In an amendment to the answer, they aver that Meux did not actually sign the above memorandum, but that Glenn signed his own name, and also that of Meux, without written authority from the latter to do so.

The only findings of fact are: 1. "That all the allegations and averments of the plaintiff's complaint are true, and the allegations and denials of the defendant's answer are untrue"; and 2. That the contract mentioned in the cross-complaint, "if any such was made," was not reduced to writing *and* signed by the defendants to said cross-

complaint, or by either of them, and that they did not take possession of the land.

Waiving the question as to what right the defendant may have for affirmative relief, we cannot see how the first finding is justified by the evidence, or upon what theory the judgment in favor of plaintiff for the six hundred dollars can be maintained. The evidence shows that the money was paid in accordance with the written instrument set forth in full in the answer to the cross-complaint. Indeed, the only evidence introduced by plaintiff at the trial was that instrument, and proof by a witness that the six hundred dollars was paid "under and by virtue of that paper." He then rested, and defendant made a motion for a nonsuit, which was denied. Meux then testified, for defendant, that while he did not sign his name to the instrument, it was signed by his agent, and that he ratified it, and joined afterwards in executing and tendering a deed in compliance with it. Defendant's evidence also showed that Meux and Glenn owned the land and could have given a perfect title; that plaintiff and his assignors made no objection to the title, or to the contract, when the deferred payments became due, but merely asked further time in which to pay, and were granted such time, until finally they concluded to repudiate the entire contract. How can it be said, therefore, that "all the allegations and averments of the plaintiff's complaint are true"?—that is, that "on the fourth day of April, 1888, said defendant was indebted to plaintiff and his assignors in the sum of six hundred dollars, gold coin of the United States, for money had and received by said defendant, upon said 4th of April, 1888, for the use and benefit and on account of said plaintiff and his assignors?" The plaintiff introduces in evidence a certain written instrument which he is shown to have received and accepted, and proves that the money sued for was paid under and by virtue of that paper. But that instrument

shows that plaintiff paid the money, upon the express understanding and condition that it was not to be returned to him; that it was money "had and received by defendant, for the use and benefit of" Meux and Glenn, and not for the use and benefit of plaintiff or his assignors. There was no necessity for the vendees to sign the written memorandum. (*Vassault* v. *Edwards,* 43 Cal. 458.) Moreover, they did sign it, by indorsing on it an assignment to plaintiff. The court does not find whether or not Meux signed the contract or was a party to it; but the evidence clearly shows that he ratified it as soon as his co-vendor informed him of it, and soon afterwards, when he came to Fresno, "again ratified the sale between the parties, *and talked with the purchasers about it.*" Again, when the deferred payments became due, he asked the vendees for the money; and they, making no objection of any kind, simply asked for some delay until they could make arrangements to pay. They proposed at one time to give a mortgage, and then concluded not to do so. And finally, Meux united with Glenn in executing and tendering a deed. This was a complete ratification; and he would have been estopped from making a defense for himself which plaintiff seeks to suggest for him. Moreover, so far as plaintiff's alleged cause for action for the six hundred dollars paid by him is concerned, he is endeavoring to undermine an executed contract; while the principle which he invokes applies to actions for the enforcement of executory contracts. We see no grounds upon which the judgment in his favor can rest. The nonsuit should have been granted.

It is not necessary to discuss the defendant's claim for affirmative relief; for the findings on that subject are clearly insufficient.

The judgment and order are reversed, and the cause remanded for a new trial.

THORNTON, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

[No. 13845. In Bank.—December 20, 1890.]

JOSEPHINE H. BISHOP, PETITIONER, *v.* THE SUPERIOR COURT OF LOS ANGELES COUNTY, AND J. W. McKINLEY, JUDGE, RESPONDENTS.

PROHIBITION — EMINENT DOMAIN — MUNICIPAL CORPORATIONS — RIGHT OF WAY FOR SEWER—FAILURE TO AGREE—AUTHORITY TO SUE.—A writ of prohibition will not lie to restrain the prosecution of an action by city authorities to condemn a right of way for a sewer, on account of the absence of an averment or proof that the city authorities were unable to agree with the defendant, or that the local board of the municipal corporation had expressly directed the institution of the proceeding.

ID.—JURISDICTION—QUESTION OF LAW—APPEAL.—Whether or not the failure to agree or to authorize the suit is a bar to the condemnation proceeding is not a question going to the jurisdiction of the superior court, but is a question of law to be determined by it in the course of the proceeding; and any error in such determination is subject to review upon appeal, and does not furnish ground for a writ of prohibition.

ID.—SUPERIOR COURT—JURISDICTION OF CONDEMNATION PROCEEDING —CONSTITUTIONAL LAW—SPECIAL CASES—CODE—MUNICIPAL GOVERNMENT ACT.—The superior court is a court of general jurisdiction, and derives its jurisdiction to entertain a proceeding by a city or town to condemn private property for a right of way from the constitutional grant of jurisdiction over special cases not otherwise provided for, and from the provisions of the code relative to special proceedings, and not from the municipal government act.

ID.—CONSTRUCTION OF MUNICIPAL GOVERNMENT ACT—FAILURE TO AGREE—DIRECTION TO SUE.—The provisions of section 870 of the municipal government act do not affect the jurisdiction of the superior court to hear and determine all questions that may arise between the parties in a condemnation proceeding by a city or town, although a failure to agree, or to direct suit to be brought as therein provided, may affect the right of the municipality to maintain the action and to secure the relief demanded.

PETITION to the Supreme Court for a writ of prohibition to the Superior Court of Los Angeles County, and J. W. McKinley, Judge. The facts are stated in the opinion of the court.

Garber, Boalt & Bishop, and *Stephen M. White,* for Petitioner.

Section 870 of the municipal corporation act is constitutional. (*Pritchett* v. *Stanislaus Co.,* 73 Cal. 310.)

Being specially applicable to municipal corporations, it controls the general law as to condemnation proceedings. (1 Dillon on Municipal Corporations, 3d ed., secs. 87, note, 89, 507.) The jurisdiction of the superior court *quoad* these proceedings is statutory and special. Special statutory authority must be strictly pursued, or the exercise of it may be impeached collaterally for want or excess of jurisdiction. (Cooley on Taxation, 2d ed., 526; 7 Robinson's Practice, 67, 107, 109; Wells on Jurisdiction, sec. 70; *People* v. *Otis,* 74 Ill. 384; *Thatcher* v. *Powell,* 6 Wheat. 127; *Williamson* v. *Berry,* 8 How. 494; *Webster* v. *Reid,* 11 How. 460; *Auditor-General* v. *Pullman,* 34 Mich. 59; *Rogers* v. *Dill,* 6 Hill, 415; *In re Smith,* 10 Wend. 449; *Guisebert* v. *Etchison,* 51 Md. 487; *Kelly* v. *Bemis,* 4 Gray, 84; 64 Am. Dec. 50; *Folger* v. *Columbian Co.,* 99 Mass. 274; 96 Am. Dec. 747; *Harshaw* v. *Taylor,* 3 Jones, 513; *State* v. *Fond du Lac,* 42 Wis. 287; *Baker* v. *Lorrillard,* 4 N. Y. 266; *Chollar M. Co.* v. *Wilson,* 66 Cal. 374; *S. F. etc. Co.* v. *Alameda Water Co.,* 36 Cal. 644; *Dorsey* v. *Barry,* 24 Cal. 452; *Whitney* v. *Delegates,* 14 Cal. 503; *Saunders* v. *Haynes,* 13 Cal. 150; *Mulligan* v. *Smith,* 59 Cal. 206.) Where the statute makes a failure to agree a condition precedent to suit, it is jurisdictional. (*Gilmer* v. *Lime Point,* 19 Cal. 58; *Contra Costa R. R. Co.* v. *Moss,* 23 Cal. 324; *Lincoln* v. *Colusa Co.,* 28 Cal. 666; *S. F. & A. W. Co.* v. *A. W. Co.,* 36 Cal. 646; *Mahoney* v. *Supervisors,* 53 Cal. 383; *Hyslop* v. *Finch,* 99 Ill. 171; Lewis on Eminent Domain, sec. 301; *In re Lockport etc. R. R. Co.,* 77 N. Y. 557; *In re Boston etc. R'y Co.,* 79 N. Y. 70; *Lind* v. *Clemens,* 44 Mo. 540; *Reitenbaugh* v. *Chester V. R. R.,* 21 Pa. St. 100; *Dyckman* v. *Mayor,* 5 N. Y. 437; *Gilbert* v. *Columbia Turnpike Co.,* 3 Johns. Cas. 107; *State* v. *Trenton,* 36 N. J. L. 499; *Vail* v. *Morris etc. R. R. Co.,* 21 N. J. L. 189; *Doughty* v. *S. & E. R. R. Co.,* 21 N. J. L. 442; *Coster* v. *New Jersey R. R. Co.,* 23 N. J. L. 227; *State* v. *Plainfield,* 41 N. J. L. 140; *Leslie* v. *St. Louis,* 47 Mo. 474; *Whistler* v. *Drain Co.,* 40 Mich.

591; *Oregon R'y & Nav. Co.* v. *Oregon Real Estate Co.*, 10 Or. 444; *Powers* v. *R'y Co.*, 33 Ohio St. 429; *Howland* v. *School District*, 15 R. I. 184.) An express direction by the trustees of the city to bring the suit was essential to jurisdiction. (Lewis on Eminent Domain, sec. 308, and cases cited.) Prohibition is the proper remedy, as the court cannot give itself jurisdiction by an erroneous decision. (*State* v. *Hudnall*, 2 Nott & McC. 419; *Thompson* v. *Ingham*, 68 Eng. Com. L. 718; *Cox* v. *Mayor*, L. R. 2 H. L. Cas. 254; *Liverpool* v. *Everton*, L. R. 6 Com. P. 418; *Queen v. Judge*, L. R. 20 Q. B. Div. 167.)

John Haynes, and *Thomas Mitchell*, for Respondents.

The question is, not whether the city of Pasadena was entitled to recover in the action in the superior court, but whether that court had jurisdiction to hear and determine that question. (*Ex parte Gordon*, 104 U. S. 515.) This is not a summary proceeding under a special statute, but is a proceeding under a general statute, in a court of general jurisdiction, in the nature of an action falling within the usual powers of the court. (*Harvey* v. *Tyler*, 2 Wall. 342.) Jurisdiction is the power to hear and determine the subject-matter involved. (*United States* v. *Arredondo*, 6 Pet. 709; *Hunt* v. *Hunt*, 72 N. Y. 229, 230; 28 Am. Rep. 129. See also *Central Pacific R. R. Co.* v. *Placer Co.*, 43 Cal. 368; *Lange* v. *Benedict*, 73 N. Y. 28; 29 Am. Rep. 80; *Ackerley* v. *Parkinson*, 3 Maule & S. 411, 427.) The commission of an error of judgment cannot be arrested or corrected by the writ of prohibition. (*Powelson* v. *Lockwood*, 82 Cal. 613; *Ex parte Pennsylvania*, 109 U. S. 174; *Murphy* v. *Superior Court*, 84 Cal. 592.) The jurisdiction of the superior court is not derived from section 870 of the municipal government act, but is derived from the general law. (Code Civ. Proc., secs. 1237, 1238, 1243; *Boom Co.* v. *Patterson*, 98 U. S. 406; *United States* v. *Jones*, 109 U. S. 518.)

Fox, J.—This is a petition for a writ of prohibition to restrain the superior court of the county of Los Angeles, McKinley, Judge, from further proceedings against the petitioner in a certain action pending in that court, wherein the city of Pasadena is plaintiff, and the petitioner herein, and several other persons, including the county of Los Angeles, are defendants, brought for the purpose of acquiring, by condemnation, a right of way for a sewer along and in certain of the county roads of said county of Los Angeles.

The city of Pasadena is a municipal corporation of the sixth class, organized and existing under the provisions of chapter 7 of the act of the legislature, entitled "An act to provide for the organization, incorporation, and government of municipal corporations," approved March 13, 1883. For the purpose of providing drainage for the city, and protecting the health of the inhabitants thereof, she has devised and adopted a system of sewerage, and secured a considerable tract of land situate outside of and a considerable distance from the corporation as a place for the discharge of the sewerage of the city, called the "sewer farm," and has commenced the construction of a main sewer through certain streets of the city, and contemplates continuing the same through certain of the public highways of the county from the city to said "sewer farm." The right of way has been granted by the board of supervisors of the county, for said sewer, through the necessary highways, for a portion of the distance, but there is one highway through which the city authorities declare that it is necessary to construct the same, the fee of which is not vested in the county, but the county has a grant of the same, "for the purposes of a highway, but for no other purpose," or in other words, a mere easement; and to secure the right of way for this sewer in that highway, which constitutes a part of the route of the sewer, the action was brought, the further prosecution of which it is now sought to prohibit.

It is claimed on the part of the petitioner here, who is the owner of a tract of land situate on the east side of the road or highway along which the right of way is sought to be secured by condemnation, and who owns the fee to the center of the road, and covering that part of the roadway in front of her lot under which the sewer is to be laid, that the court has no jurisdiction to entertain the case, or to render or enforce any judgment therein, because it is not alleged or shown that the city authorities were unable to agree with her for the right of way, and because it does not appear, from the record of the proceedings of the city council, that it ever authorized the commencement of the action.

The question, then, is, whether the absence of the existence, or the want of averment or proof, of these two facts, or either of them, deprives the court below, respondent here, of all jurisdiction to entertain, hear, or determine the action, or whether they simply go to the question of the right of the plaintiff in the action to institute and maintain the same, and to recover therein. If they deprive the court of jurisdiction to entertain the action, and to hear and determine the rights of the parties therein, so that it is acting upon the complaint filed therein wholly without jurisdiction, then it would seem that the petitioner here might be entitled to relief by prohibition; but if, on the other hand, it has jurisdiction to entertain the action for condemnation so commenced before it, and these are merely questions upon which among others, it may be called upon to adjudicate in the course of the proceeding before it, then the mere fact that it reaches an erroneous conclusion upon these questions, or either of them, will not entitle plaintiff to the writ of prohibition, but the error, if it be one, will be subject to review upon appeal.

Chapter 7 of the municipal incorporation act referred to is the one which provides for the organization, powers, and government of municipalities of the sixth class.

Section 862 of that act, found in that chapter (Stats. 1883, p. 269), gives to the board of trustees power to construct, establish, and maintain drains and sewers. Section 870 (p. 273), so far as it relates to the subject-matter of this question, reads as follows: "Whenever it shall become necessary for the city or town to take or damage private property for the purpose of . . . . rights of way for drains, sewers, and aqueducts, ... and the board of trustees cannot agree with the owner thereof as to the price to be paid, the trustees may direct proceedings to be taken under section 1237 and following sections, to and including section 1263, of the Code of Civil Procedure, to procure the same."

Petitioner insists most strenuously that it is from this section that the court derives its jurisdiction to entertain a proceeding for condemnation, for such a purpose, at the suit of such a corporation; and that if the complaint fails to show, or showing it, upon the trial, the plaintiff fails to prove, an attempt and inability to agree, and an order of the trustees to prosecute the action, the court is entirely without jurisdiction in the premises.

We cannot accede to this proposition. The superior court is a court of general jurisdiction. By section 5 of article 6 of the constitution it is specially provided that it shall have jurisdiction "of all such special cases and proceedings as are not otherwise provided for." Part 3 of the Code of Civil Procedure provides for "special proceedings of a civil nature." Title 7 of that part is devoted specially to the making of provision for proceedings had in the exercise "of eminent domain." It constitutes the general law of the state upon that subject, and expressly provides that the right of the people or government to take private property for public use may be exercised in the manner provided in that title. Section 1243, found in that title, provides that "all proceedings under this title must be brought in the superior court of the county in which the property is situate."

They must be commenced by the filing of a complaint and issuing a summons thereon. Section 1238 defines the purposes for which the power may be exercised, and among these is "sewerage of any incorporated city." It is from the constitution, the provisions of which are repeated in section 76 of the Code of Civil Procedure, and from title 7, part 3, of said code, and not from any section or provision of the municipal government act, that the superior court derives its jurisdiction in and over proceedings had in the exercise of the power of eminent domain. The provisions of the last-named act may affect the question of the right of the municipality to maintain its action, and secure in the court the relief demanded, but they do not affect the jurisdiction of the court to hear and determine all questions that may arise between the parties in such proceeding.

Counsel have cited very many cases in support of the proposition that the fact of inability to agree, and express authorization to institute the proceeding, are jurisdictional, and go to the power of the court itself to hear and determine the case. But most of them are cases where the proceeding was not only special, and not according to the usual course of civil procedure, as it is here, but also before tribunals which were themselves special and of limited jurisdiction. No one of them, so far as we have been able to find, challenges the power of a court of general jurisdiction to hear and determine, in such a proceeding, the question of the right of parties to maintain the action and secure the relief under statutory provisions like that above quoted from the municipal government act. The rulings made in the cases cited were made, not upon application for prohibition, but upon appeal, or when the proceeding was before a tribunal of special and limited jurisdiction, upon *certiorari*.

The complaint in the condemnation proceeding here sought to be prohibited is in strict conformity with the

provisions of section 1244 of the Code of Civil Procedure, and contains everything that is there required. If it be true that the absence of either averment or proof of attempt and inability to agree, or of express direction by the local board to institute and prosecute the proceeding, bars the right of the plaintiff to maintain the action, or to recover the relief sought, that would seem to be a matter of defense, either by demurrer or by plea, and in such case the court before which the proceeding is prosecuted would be the one to pass upon the question so raised, in the first instance. Error in such determination would be subject to review upon appeal; but it would be merely error in the exercise of jurisdiction, and would not entitle the party aggrieved to prohibition. We are not called upon or authorized, in this proceeding, to determine whether a ruling either way upon such a question would be error; that must be determined when the case comes here in proper form. All that we need now determine is, that, if error, it does not furnish ground for prohibition.

Upon this proposition, the case of *State* v. *Valliant*, 13 S. W. Rep. 398, seems to be much in point. We quote the statement as to what the case was, and as to what the court said on the subject, from petitioner's reply brief: "A certain railroad company sought to condemn part of the track of another, by proceedings taken in the circuit court of St. Louis. The defendant company applied for a writ of prohibition, on the ground that the statutes and ordinances of St. Louis did not authorize the exercise of jurisdiction in eminent domain there invoked in favor of the company invoking it." Upon the application for prohibition, the court held "that the circuit court of St. Louis had jurisdiction of proceedings to appropriate property to public use, in the exercise of the right of eminent domain, in a proper case, is unquestioned and unquestionable; but the substance of the petitioner's contention here, as well as the ground on

which they, as defendants, resisted the proceedings in the circuit court, is, that the statutes and ordinances do not authorize the exercise of such jurisdiction in behalf of the Southern Railroad Company. We are of opinion that the question thus raised is not a proper one for our decision upon this application. Where the action or course which the court is about to adopt is such as it has lawful power to take, it should not ordinarily be prohibited from taking it. Whether the particular facts on which the court proceeds in that regard are or are not sufficient to justify its exercise of jurisdiction, is a question of law, the solution of which, either way, cannot impair the court's right to apply its judicial power in the premises according to its view of the law, and of the facts before it."

This quotation, taken from the petitioner's own brief, would seem to be conclusive against her in this proceeding. Nor is there anything in any of the cases cited from this court in conflict with this view. We have examined them all, and in every case but one, where the court has discussed the point here contended for by petitioner, it was upon appeal, and the question was, whether the court below had erred in its determination of this question of law, not in exercising jurisdiction to determine upon it. In the one case of *Mahoney* v. *Supervisors,* 53 Cal. 384, the proceeding was for a writ of mandate to compel the board of supervisors to act upon the appointment of commisisoners, made by the mayor and others, to condemn certain water rights. The petitioner, who claimed to be the owner of the property which was to be condemned, failed to show that he had ever offered to sell at any price. The statute and the tribunal were both special and local; and the act provided for the appointment of commissioners only in case the municipal authorities, who had not only the authority to purchase, but to select the commissioners in case the property could not be acquired by negotia-

tion. The court refused to grant the writ. We do not see that the case is at all in point.

Petitioner relies upon the decision of this court recently made in the case of *Havemeyer* v. *Superior Court,* as decisive of the question of her right to the writ of prohibition in this case. The cases are not at all parallel. In the Havemeyer case, the proceeding in the court below was one taken on behalf of the state to secure a decree declaring the corporate franchise of a private corporation forfeited, and for a statutory penalty for violation of its charter. Upon the application for prohibition in this court, no question was made as to the jurisdiction of the court below to hear and determine the action which was brought before it, and in it to determine every question that was raised affecting the rights of the parties to the action in the subject-matter thereof. And this court, in passing upon the application, expressly declared, in substance, that it did not pass upon the jurisdiction or the regularity of the proceedings of the court below in hearing and determining the case before it, or in enforcing the judgment which it had rendered. The proceeding to which the judgment of and the writ granted by this court was directed was one had after judgment in the matter of appointing a receiver with express direction to seize and take into his possession certain property not involved in the action in which the court had pronounced its judgment, and which was at the time in the possession of and claimed to be owned by persons who were not parties to that action, and who, consequently, had no day in court, and no right of appeal. In this case the petitioner is a party defendant in the action pending in the court below, and is actively prosecuting her defense, with a right to have any ruling which may be made in that court reviewed here on appeal. In the view we take of the case, she is not entitled to the relief here demanded.

The writ must be denied, and the order heretofore made herein, staying proceedings in the court below, vacated.

So ordered.

THORNTON, J., SHARPSTEIN, J., and PATERSON, J., concurred.

[No. 13470. In Bank.—December 20, 1890.]

JOHN VORWERK, APPELLANT, *v.* C. A. NOLTE, RESPONDENT.

VENDOR AND PURCHASER—CONTRACT OF SALE—CONSTRUCTION—USE OF PRINTED BLANK.—When a printed blank is used in a contract for the sale of land, if there is any doubt about how the contract is to be construed, and words found in the printed part are repugnant to the general scope and purpose of the contract, as the same appears from the original or written parts thereof, the latter must control.

ID.—CONTRACT MAKING TIME OF ESSENCE—PAYMENT OF PURCHASE-MONEY—CONVEYANCE AT FUTURE TIME.—When the provision that "time is of the essence of the contract" is used in a contract of sale with reference to payments of purchase-money, its object is to protect the vendor against delays in future payments, and it has no application, where the price is already fully paid, and nothing remains to be done but to make the conveyance; and if such provision is contained in a printed form used in making the contract, it will not be construed to apply to the written promise of the vendor to execute a deed within one year.

ID.—VENDEE IN POSSESSION—TENDER OF DEED AFTER TIME LIMITED. —RECOVERY OF PURCHASE-MONEY—When the vendee remains in possession and receives the rents and profits after the time limited for the tender of a deed, he cannot avail himself of a promise of the vendor to return the purchase-money, with three per cent per month interest thereon, if he should fail to deliver a deed within one year, if a deed conveying good title is tendered within three days after a demand made therefor, and within eight days after the expiration of the year.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

Action to recover $3,750, and interest at the rate of three per cent per month from June 24, 1887. The action is upon a contract in writing, whereby the plain-

tiff agreed to pay, and did pay, to the defendant, $3,750 for a certain lot of land which the defendant agreed to convey to the plaintiff one year after the date of the contract. The contract was dated June 24, 1887. On the same day, and before the plaintiff paid to the defendant the said $3,750, the defendant made and executed the following agreement, to wit:—

"This agreement is to certify that I, the undersigned, promise to execute a deed to a lot on First Street, to which I executed, to-day, an agreement, and which has been paid in full by Mr. John Vorwerk, and in case of failure of the undersigned to deliver and execute a deed after one year from date hereof, bind myself to refund the purchase price, three thousand seven hundred and fifty dollars ($3,750), with interest at the rate of three per cent per month. C. A. NOLTE."

A deed was not tendered until July 2, 1888, when the tender thereof was refused. The contract to convey, in which Nolte was named as the party of the first part, and Vorwerk the party of the second part, acknowledged receipt, in full, of the purchase-money, $3,750, for the land described in the contract, and contained the following clauses: "It is further agreed that time is of the essence of this contract; and in the event of a failure to comply with the terms hereof by the said party of the second part, the said party of the first part shall be released from all obligations in law or equity to convey said property, and said party of the second part shall forfeit all right thereto, and to moneys theretofore paid under this contract, and interest in or to said moneys or said property shall thereupon immediately cease, as fully as if said moneys had never been paid or this agreement entered into. And the said party of the first part, on receiving such payment as hereby acknowledged at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed of grant, bargain, and

sale, conveying to said party of the second part, or to his assigns, the title to said premises. Said perfect deed has to be executed by said first party and delivered to the said second party one year after date of this." On the first hearing of the cause in Bank, the judgment and order appealed from were reversed, upon the ground that the parties had agreed to make time of the essence of the contract, and that the failure to deliver the deed within the year, as agreed, made the vendor liable upon the contract to refund the purchase-money, with interest at the rate of three per cent per month. Further facts are stated in the present opinion of the court, which was rendered on rehearing of the cause in Bank.

J. W. Mitchell, and *Chapman & Hendrick,* for Appellant.

The contract was alternative to deliver the deed or to repay the money, with the agreed interest. (Chitty on Contracts, 624 b, subd. 2; 2 Wharton on Contracts, c. 18, secs. 619, 620; 2 Parsons on Contracts, 657.) The right of election is in the promisor. (3 Addison on Contracts, 1188.) The election must be made before the day of performance, or the right is lost, and passes to the other party. (Parsons on Contracts, 651; 2 Wharton on Contracts, secs. 620, 622; Civ. Code, sec. 1449; *Drake* v. *Harrison,* 69 Wis. 99; *Rewrick* v. *Goldstone,* 48 Cal. 554.)

J. D. Bicknell, and *R. H. F. Variel,* for Respondent.

Forfeitures are not favored and will not be enforced in equity, but will be relieved against where compensation can be made, and there is no grossly negligent, willful, or fraudulent breach of duty. (Civ. Code, sec. 3275; *Keller* v. *Lewis,* 53 Cal. 118; Story's Eq. Jur., sec. 1319, and cases cited; *McCormick* v. *Rossi,* 70 Cal. 474.) Plaintiff, being in possession under the contract, cannot reclaim the purchase-money without surrendering possession. (*Haynes* v. *White,* 55 Cal. 38; Civ. Code, sec.

1691; Pomeroy on Specific Performance, secs. 375, 376.) There has been no time that the contract could not have been specifically enforced by the plaintiff. (*Vassault* v. *Edwards,* 43 Cal. 459.) Defendant never had the right to elect not to make a deed, and the doctrine of election is inapplicable.

Stephen M. White, amicus curiæ, also for Respondent.

Vorwerk's conduct in retaining possession constitutes a waiver of the condition as to time of execution of the deed. (Pomeroy on Specific Performance, secs. 394, 424.) It is inconsistent with the maxim, *Qui sintit commodum sentire debet et onus.*

Fox, J.—Upon rehearing and reargument of this case, a fact is conceded which was before sufficiently apparent to be suspected, but not sufficiently so, from the record as printed here, to justify action upon it as a fact provided; viz., that the original contract between the parties was partly written and partly printed; that in preparing it, the parties had used a form printed in blank, in common use in the preparation of contracts for the sale of real property, where deferred payments were to be made; and that the words "time is of the essence of this contract," as found therein, was a portion of the printed and not of the written matter. If, therefore, there is any doubt about how the contract is to be construed, the rule prescribed in section 1651 of the Civil Code is to be applied in the construction thereof. Applying this rule, and it appearing not only that the contract was partly written and partly printed, but that the printed part was prepared without special reference to these particular parties or this particular contract, the question is, whether these words so found in the printed part are repugnant to the general scope and purpose of the contract as the same appears from the original or written parts thereof. Of this we think

there can be no doubt. It is a matter of common understanding that when these words—"time is of the essence of this contract"—are used, it is with reference to future payments; that their purpose is to protect the vendor against delays in payment of the purchase price, and the tying up of his estate beyond the fixed period, without the payment of the agreed compensation therefor; and that they have no place in the contract after the full price is paid, and when nothing remains to be done but to make the conveyance. Even where there are future payments to be made, if the time of payment is not fixed, time is not of the essence of the contract. (*Day* v. *Cohn,* 65 Cal. 508.) It is evident that in the blank used in this case, the words were inserted and used solely with reference to the duties of the vendee, the party of the second part; for immediately after them, and in the same connection, we find the following: "In event of a failure to comply with the terms hereof by the said party of the second part, the said party of the first part shall be released from all obligations in law and equity to convey said property," etc. Then, in another part of the instrument,—the written part thereof,—it is provided that the vendor, the party of the first part, shall have one year in which to make the conveyance, and it is alleged and found that this was done to enable him first to secure the cancellation of an existing mortgage, which was not then mature.

By the subsequent writing, made on the same day, it was provided that if the vendor failed to execute and deliver a deed "after one year from the date hereof," he should return the purchase price, with three per cent per month interest thereon. Meantime, the vendee went into immediate possession, and received the rents of the premises. The year expired June 24th. On the 29th, the purchaser demanded his deed, and three days later, which defendant testifies was as soon as he could have it prepared, he tendered the deed, duly executed. No ob-

jection was made to it that it was not properly executed, or did not convey good title. The vendee was still in possession, and had collected the rents up to a time even beyond that of the date of the tender. We think the deed was tendered in time, and that the defendant was not liable to an action for the return of the purchase-money, with the thirty-six per cent interest money thereon, or any part thereof.

The order heretofore made in this court in this cause is vacated and set aside, and the judgment and order appealed from are affirmed.

McFARLAND, J., PATERSON, J., and THORNTON, J., concurred.

Rehearing denied.

[No. 13179. In Bank.—December 20, 1890.]

A. O. PERKINS, RESPONDENT, v. ELLWOOD COOPER ET AL., APPELLANT.

APPEAL—DISMISSAL—FAILURE TO FILE UNDERTAKING.—Where an undertaking on appeal is not filed or waived within the time prescribed by law, the appeal is ineffectual for any purpose, and will be dismissed.

ID.—SUBSEQUENT WAIVER OF UNDERTAKING—STIPULATION IN TRANSCRIPT.—The filing of an undertaking cannot be waived by a stipulation made after the right of appeal has been lost; and a stipulation to the correctness of the transcript, stating that an undertaking on appeal was duly executed and filed, if proved and conceded to be untrue, and made without knowledge of the facts, is not binding, and does not constitute a valid waiver of the undertaking, there being no appeal pending in this court when the stipulation was made.

APPEAL from a judgment of the Superior Court of Santa Barbara County, and from an order denying a new trial.

Upon a former hearing in Bank, a decision was rendered upon the merits of the appeal on the 8th of July.

1890, by which the judgment was reversed, and the cause remanded for a new trial. A rehearing was granted, upon the question of the jurisdiction of the court. The facts appertaining to this question, and to the dismissal of the appeal, are stated in the present opinion of the court.

E. B. Hall, R. B. Canfield, and *J. W. Taggart,* for Appellants.

The appeal was taken when the notice of appeal was filed and served. (*Lowell* v. *Lowell,* 55 Cal. 319; Hayne on New Trial and Appeal, sec. 206.) The stipulation annexed to the transcript shows that the appeal was perfected, and is conclusive upon the respondent here. (*Bonds* v. *Hickman,* 29 Cal. 460; *Carey* v. *Brown,* 58 Cal. 185; Hayne on New Trial and Appeal, sec. 283, and cases cited.) The evidence offered in the petition for a rehearing, and in the affidavits subsequently filed, should not now be considered in contradiction of the record as presented in the transcript. This is an attempt, on the part of respondent, after the submission and decision of the cause, to raise technical objections to the record affecting appellants' right to be heard. The objections should have been made before the hearing, or they cannot be considered. (Rule 13 of supreme court.) It is too late to rescind the stipulation, respondent's counsel having confessedly discovered the facts avoiding the stipulation before October, 1889, and before the year for taking a new appeal had elapsed. (*Moyle* v. *Landers,* 78 Cal. 106; 12 Am. St. Rep. 22.) The stipulation is a waiver of the undertaking. (Code Civ. Proc., secs. 940, 953; *In re Medbury,* 48 Cal. 83.) The parties may submit, by agreement, to the appellate jurisdiction of a court vested with general jurisdiction of the subject-matter involved in the controversy. (See Wells on Jurisdiction, sec. 86; *Warner* v. *Holman,* 24 Cal. 228, decision on petition for rehearing, p. 229, and comments on the decision in *Buffandeau* v. *Edmondson,* 24

Cal. 96; *Moyle* v. *Landers*, 78 Cal. 106; 12 Am. St. Rep. 22.)

B. F. Thomas, for Respondent.

The appeal was not effectual for any purpose, no undertaking having been filed or waived within the statutory time. (Code Civ. Proc., sec. 940; *Reed* v. *Kimball*, 52 Cal. 325; *Boyd* v. *Burrel*, 60 Cal. 280; *Biagi* v. *Howes*, 63 Cal. 384; *Stratton* v. *Graham*, 68 Cal. 168; *Duffy* v. *Greenebaum*, 72 Cal. 157; *Brown* v. *Green*, 65 Cal. 221; *Bellegarde* v. *S. F. Bridge Co.*, 80 Cal. 61; *Schurtz* v. *Romer*, 81 Cal. 244.) The stipulation is not such a waiver as is contemplated by the Code of Civil Procedure, not having been filed in the court below. (Code Civ. Proc., sec. 940; *Merritt* v. *Wilcox*, 52 Cal. 238; *Borkheim* v. *North B. & M. Ins. Co.*, 38 Cal. 623.) The undertaking could not be waived after the right of appeal was lost, nor could consent confer jurisdiction thereafter. (*In re Skerrett*, 80 Cal. 62; *Stark* v. *Jenkins*, 1 Wash. 421; 1 Am. & Eng. Ency. of Law, 621; *Wait* v. *Van Allen*, 22 N. Y. 319; *Clapp* v. *Hawley*, 97 N. Y. 610.)

THE COURT.—Attention was called to the fact so briefly, and in such an incidental way, at the original hearing, that it escaped our notice; but upon rehearing, it is made manifest to us that there is nothing before us, in this cause, which we have jurisdiction to hear and determine.

A money judgment was rendered in the cause October 31, 1888. Notice of appeal was served and filed December 26th of the same year. No undertaking on appeal was ever filed or waived. The appeal was therefore "ineffectual for any purpose." (Code Civ. Proc., sec. 940; *Holcomb* v. *Sawyer*, 51 Cal. 417; *Boyd* v. *Burrel*, 60 Cal. 281; *Biagi* v. *Howes*, 63 Cal. 384; *Brown* v. *Green*, 65 Cal. 222; *Stratton* v. *Graham*, 68 Cal. 168; *Little* v. *Jacks*, 68 Cal. 344, 345; *Duffy* v. *Greenebaum*, 72 Cal. 159; *Estate of*

Skerrett, 80 Cal. 63; *Schurtz* v. *Romer,* 81 Cal. 245.) The appeal being ineffectual for any purpose, there has been and is no case here for our determination.

Attached to the transcript which has been filed herein, there is a stipulation, entitled in this court, agreeing to the correctness of the transcript, and stating that a good and sufficient undertaking on appeal has been duly executed and filed. It is both proved and conceded that this statement is untrue, and the attorney for respondent says that he signed it without actual knowledge of the fact, and relying upon the statement of the counsel on the other side that such an undertaking had been filed, coupled with the fact that he knew the counsel to be perfectly familiar with the requirements of the statute and a careful practitioner, and also that the parties were amply able to file the undertaking. There is possibly some doubt as to just what was said on the subject when that stipulation was signed; but there is no doubt about the fact that the statement contained in it on the subject of undertaking was untrue. From that fact, it follows,— 1. That there was then no case in this court in which counsel could bind a client by such a stipulation; 2. That if the language of the stipulation could possibly be construed as a waiver of an undertaking (which we very much doubt), it could only operate as a waiver as of and from the date of the stipulation, March 28, 1889, and there was at that date no appeal pending in which to waive an undertaking, and no cause pending in this court in which to make the stipulation. In *In re Skerrett,* 80 Cal. 63, it was held that, in order to entitle certain parties to appeal without filing an undertaking, under section 946 of the Code of Civil Procedure, the order dispensing with the undertaking must be made within the time prescribed by law for filing the undertaking. So if the filing of an undertaking is to be waived, it must be done within the time for filing; otherwise, the appeal is lost,

and the party has acquired a right of which he cannot be deprived by that attempt to appeal.

The order heretofore entered in this cause must be set aside, and the attempted appeal dismissed. So ordered.

Rehearing denied.

[No. 13772. Department Two.—December 22, 1890.]

A. H. WHITE, TRUSTEE, ETC., RESPONDENT, *v.* H. E. ALLATT ET AL., APPELLANT.

FORECLOSURE OF MORTGAGE—NOTES PAYABLE TO TRUSTEE OF ESTATE—PLEADING—IMMATERIAL ALLEGATION—SUPPORT OF JUDGMENT.—In an action to foreclose a mortgage given to secure the payment of certain promisory notes, where it appears that the notes set out in the complaint were made payable to the mortgagee as trustee of the estate of a deceased person, an averment, in the complaint, that plaintiff is the owner of the notes and mortgage as trustee of the heirs of said decedent, is immaterial and redundant, and must be disregarded; and a judgment in favor of the mortgagee as trustee of the estate of the decedent is sustained by the pleadings.

ID.—PARTIES—TRUSTEE OF EXPRESS TRUST.—Where notes and a mortgage to secure them are taken by a trustee in his own name for the benefit of the estates of a decedent, he becomes the trustee of an express trust, and, as such, may sue to foreclose the mortgage, without joining with him the persons for whose benefit the action is prosecuted.

ID.—ATTORNEY'S FEES—NOTE NOT DUE—AMBIGUITY—CONSTRUCTION OF PLEADINGS.—It appearing that when the action was commenced one of the notes described in the complaint and secured by the mortgage was not yet due, an averment respecting what are reasonable attorney's fees for the foreclosure of the mortgage is not ambiguous or uncertain, but the amount demanded must be held to relate to the foreclosure as to the notes due, and not to all of the notes set up in the complaint.

ID.—REASONABLE ATTORNEY'S FEE — PLEADING — DISCRETION OF COURT.—In an action to foreclose a mortgage, where the mortgage stipulates for a reasonable attorney's fee in case of foreclosure, an averment as to what would be a reasonable fee is unnecessary, as such fee is a mere incident to the action, and the amount to be fixed is within the discretion of the court.

PLEADING—DEMURRER—AMBIGUITY AND UNCERTAINTY.—A demurrer to a complaint, on the ground of ambiguity and uncertainty in the conjunctive, cannot be sustained if the complaint is either ambiguous or uncertain, but not both.

APPEAL from a judgment of the Superior Court of San Bernardino County.

The facts are stated in the opinion.

W. J. McIntyre, and *H. Goodcell, Jr.,* for Appellants.

E. B. Stanton, for Respondent.

GIBSON, C.—This action was brought to foreclose a mortgage. The demurrer to the complaint was overruled, and upon defendants' failure to answer, judgment was rendered against them. From that judgment they bring this appeal, and claim,—1. That the demurrer should have been sustained, upon the grounds that the complaint does not state facts sufficient to constitute a cause of action, and that it is ambiguous and uncertain; and 2. That the judgment is not sustained by the pleadings.

1. It is urged that the facts are insufficient, for the reason that the plaintiff sues as trustee for seven designated persons, described as "heirs at law of B. F. White, deceased," and there is no allegation that he is a trustee, for any purpose, for any of the beneficiaries, or that the notes in suit were made, in his name, for their benefit, and therefore the persons named as beneficiaries are the real parties in interest, and not the plaintiff.

The complaint alleges that the three notes set out in it were made and delivered to the plaintiff, by the defendants, together with the mortgage in suit to secure their payment, and that the plaintiff is the owner and holder of the notes and mortgage as trustee for the beneficiaries, "all the heirs at law of B. F. White, deceased," while the notes themselves show that they were made to the plaintiff "as trustee of the estate of B. F. White, deceased."

These two allegations are said to be inconsistent with each other, because the identity of the plaintiff, as trustee

for seven particular persons described as heirs at law of B. F. White, deceased, is different from that of trustee of the estate of the same decedent. But this inconsistency is more apparent than real. It is true that in the latter capacity, if he were trustee of the whole estate, he would not only represent the heirs, but the legatees, devisees, and creditors, if any, as well; while in the first-mentioned capacity, he would simply represent the persons named as beneficiaries. This makes it appear that the first allegation is more extensive in scope than the second, and that it is not repugnant to the latter. The notes sued on are, however, the principal contract, to which the mortgage is but an incident; and as it clearly appears, from the notes themselves, that they were made to the plaintiff for the benefit of "the estate of B. F. White," deceased, he must be regarded as a trustee for that estate. These facts are material and controlling, in view of which, the averment of ownership of the notes and mortgage as trustee of the heirs of said decedent becomes immaterial and redundant matter, and, as such, must be disregarded.

By taking the notes and mortgage in his own name, for the benefit of the estate of the decedent above named, he became the trustee of an express trust, and, as such, may maintain this suit, without joining with him the persons for whose benefit the action is prosecuted. (Code Civ. Proc., sec. 369; Bliss on Code Pleading, sec. 262; Schouler on Executors and Administrators, sec. 292; Pomeroy on Remedies and Remedial Rights, sec. 175.)

This is one of the exceptions to the rule, declared in section 367 of the Code of Civil Procedure, that every action must be prosecuted in the name of the real party in interest. The complaint is therefore not objectionable upon the first ground of demurrer.

2. On the grounds of ambiguity and uncertainty, the first point made is, that the averment respecting the attorney's fee is uncertain, because it cannot be determined from the complaint whether the amount demanded is

reasonable or not, because it does not appear whether the amount is demanded for the foreclosure of the mortgage as to two or three of the notes.

Of the three notes set up in the complaint, two were due when the action was commenced, and as these two were the only ones that could be recovered upon, it seems clear enough to us that the amount demanded as an attorney's fee related to the foreclosure of the mortgage as to those two; hence it cannot be said that the complaint is, in that respect, either ambiguous or uncertain. But even if it were uncertain, such an averment is unnecessary. For, as was said in *Carriere* v. *Minturn,* 5 Cal. 435, "The counsel fees stipulated to be paid were not the cause of action, but, like the costs, a mere incident to it, and may be fixed by the chancellor, at his discretion, not exceeding the amount stipulated." This rule has not since been departed from. (*Monroe* v. *Fohl,* 72 Cal. 568; *Rapp* v. *Spring Valley Gold Co.,* 74 Cal. 532. See also *Grangers' Bus. Ass'n* v. *Clark,* 84 Cal. 201.)

What has been said regarding the objection urged upon the general ground of demurrer disposes of the remaining objections, as to the uncertainty and ambiguity of the complaint, as they are based upon the averment of trusteeship for the heirs of B. F. White, deceased, and the fact that the notes show they were made to the plaintiff as trustee for the estate of B. F. White, deceased. Again, if the complaint were either ambiguous or uncertain, but not both, the demurrer being in the conjunctive as to those two grounds, it could not be sustained. (*Kramer* v. *Halsey,* 82 Cal. 209.)

3. It is claimed that the judgment is not sustained by the pleadings, because of the averment to the effect that the plaintiff is the trustee of the persons named as heirs of the decedent, and the judgment is in favor of the plaintiff as trustee for the estate of the same decedent. But as the averment mentioned is, as above shown, immaterial, and as the notes and mortgage were made and

delivered to the plaintiff "as trustee of the estate of B. F. White, deceased," the judgment is is accordance with and supported by the complaint.

We therefore advise that the judgment be affirmed.

HAYNE, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 13643. Department Two.—December 22, 1890.]

HENRY A. GUERNSEY, RESPONDENT, *v.* WEST COAST LUMBER COMPANY, APPELLANT.

CONTRACT—ACCEPTANCE OF GOODS—WAIVER OF DEFECT.—If a party accepts and pays for part of a quantity of goods delivered under a contract, without reserving the right to object subsequently, and does not offer to return the goods delivered, but retains them, he waives any defect in their quality, and he cannot make such defects a ground of objection to goods which are to be subsequently delivered, and which are in accordance with the contract.

APPEAL from an order of the Superior Court of San Bernardino County refusing a new trial.

The facts are stated in the opinion.

Charles J. Perkins, for Appellant.

T. J. Fording, for Respondent.

HAYNE, C.—This was an action for damages for the breach of a contract to buy lumber. The contract provided that the defendant should buy all the lumber "of good, merchantable quality" which should be manufactured by the plaintiff during the year 1888 at his mill in San Bernardino County, and contained the following clause:—

"Said lumber shall be of such sizes *as are usually required for the market, and shall be designated by Guernsey,*

regard being had to a due variety of sizes, so as to meet the general requirement of the market, except that *the company may give orders for any required sizes usually cut.*"

Under this contract, the plaintiff delivered lumber to the defendant until the middle of August, and, with certain unimportant exceptions, the defendant received and paid for the lumber so delivered. About that time the employees of the defendant informed its general manager that some of the lumber which was being delivered was not thick enough, and he instructed them "to have it remedied." No order for any particular size was given to the plaintiff; but he was informed that the lumber he was sending was too thin. He promised to attend to the matter, and his men continued to deliver lumber to the defendant, and the latter to receive and pay for it, until September 20th, when the plaintiff was notified that no more lumber would be received. The plaintiff thereupon sold the remaining lumber to other parties, and brought this action to recover the difference in price. The trial court found that the defendant's refusal to receive further lumber was without excuse, and gave judgment for the plaintiff, and the defendant appeals.

We think that since the defendant accepted and paid for the lumber delivered up to September 20th, without reserving the right to object to it subsequently, and does not offer to return it, but still retains it, any ground of objection to it which may have existed could not be a reason for refusing to accept subsequent lumber which was in accordance with the contract. The ultimate question, upon which the case must turn, therefore, is, whether the subsequent lumber was in accordance with the contract.

As we have seen, the contract provided that the lumber was to be of good, merchantable quality, and of such sizes as were usually required for the market, which sizes were to be designated by the plaintiff, subject to the right of the defendant to give orders for any sizes usually

cut. Most of the evidence taken at the trial related to the question whether the lumber delivered by the plaintiff was "merchantable" within the meaning of the contract. But this seems to have been understood by everybody as having reference, not to the quality, but to *the size* of the lumber. Thus the local manager of the company testified as follows: "This Guernsey lumber was different from any other lumber that I have handled as merchantable lumber, *only as to thickness.*" I objected *on account of its being thin.* It wasn't good, merchantable lumber, *by reason of its being thin.*" All the witnesses use the term in this sense; and there is no pretense that there was any other ground of objection.

The question litigated therefore related to the size of the lumber usually required in the market. The position of the plaintiff was, that lumber seven eighths of an inch thick was sufficient; and there was evidence in support of this view. The position of the defendant was, that it was necessary that the lumber should be what was known as inch lumber. The evidence shows, however, that there was not much exactness in the use of these terms. Owing to the character of the timber of the locality, and to the usual method of manufacture, there was considerable difference in the size of the boards sawed at the same time from the same log. In this regard, one witness testified as follows: "There is never a load that comes into the market that, were you to put your rule to it, every board would show the same thickness. There never was a log on this mountain yet all the board cut from which were of the same thickness." Another witness said: "My experience has been that lumber which is cut as inch lumber very seldom comes an inch thick. It would be probably a sixteenth less; and when it dries out, it would be more than a sixteenth less. In fact, if you take dry lumber, it is sometimes three quarters of an inch, or a little more." In most loads there would be a few very thin boards, which

it was customary to reject when delivered at the yard; and this course was pursued in this case.

Understanding the terms in the above sense, we think that, even if the standard of the defendant be adopted as the true one, the preponderance of the evidence is to the effect that after the complaint made in August, the plaintiff complied with his contract.

In sawing inch lumber, the usual way was to "move the set-works an inch and a third." After the compliant mentioned, the plaintiff's works were so moved. In relation to this, the plaintiff says: "I changed my head-blocks, and after that the lumber came out a full inch."

The lumber-man to whom the plaintiff sold his lumber after the defendant refused to receive it testified as follows in relation to it: "I consider this lumber to have been fully as good as any that I ever handled; in fact better than some I have been handling in the last two years,—that is, the average of it,—better timber. I mean by this, both the quality of the lumber and its manufactured condition. It was cut well and it was good timber."

Another person from the same yard testified as follows: "What we received from Mr. Guernsey compared in thickness with the rest; if anything, his lumber was a little thicker than the other lumber that we received. I have applied the rule to measure the lumber. I can't say exactly just what it measured, but it was about as near an inch as any lumber we have received." Another lumber-man who had seen the lumber testified that the plaintiff's lumber compared favorably with that manufactured in the locality, and said: "I call it good inch lumber."

One of the plaintiff's employees who handled the lumber at the mill testified as follows: "The lumber that was cut in September was full inch. I saw nothing below an inch but what was thrown across the track. No

thin lumber, that I know of, came down at all." And the teamster who hauled the lumber to the defendant's yard testified that the last load, delivered before September 20th, "was good, average thickness; it was inch lumber."

It was also in evidence that the price of lumber had fallen below the contract price at the time of the refusal to go on with the contract, and that the defendant had engaged in a kind of work for which "they had to have extra thick lumber."

We think that the evidence is amply sufficient to sustain the decision, and we therefore advise that the order denying a new trial be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the order denying a new trial is affirmed.

[No. 12823. In Bank.—December 22, 1890.]

F. A. DRINKHOUSE, APPELLANT, *v.* SPRING VALLEY WATER WORKS, RESPONDENT.

EMINENT DOMAIN — CONDEMNATION PROCEEDINGS—LIS PENDENS—LEASE AFTER SUIT BROUGHT—PARTIES—RES ADJUDICATA.—Under section 1246 of the Code of Civil Procedure, one claiming an interest in land under a written lease executed pending an action to condemn the land is authorized to appear, plead, and defend his interest, though not named as a party to the proceedings; and where he fails to do so after he has notice of the proceeding, he is estopped by the judgment from claiming anything by virtue of his written lease, entered into subsequent to the filing of the *lis pendens*.

ID.—ACTION TO ENJOIN TAKING—EVIDENCE.—Such lessee cannot maintain an action to enjoin the taking of the property condemned pursuant to the judgment; and the judgment roll in the condemnation proceedings, and the notice of *lis pendens*, are admissible evidence against him in bar of such action.

FINDINGS—ALLEGATIONS NOT DENIED.—Where some of the material allegations of the complaint are not denied, it is not necessary to find in relation to them.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Ben Morgan, and *A. Ruef,* for Appellant.

Kellogg & King, and *William F. Herin,* for Respondent.

Plaintiff might have appeared in the condemnation proceedings. (Code Civ. Proc., sec. 1246.) Plaintiff ought to have set up his claim, if he had any, and that which ought to have been done must be regarded as done. (Code Civ. Proc., sec. 3529.) The *lis pendens* was constructive notice of the proceedings. (Code Civ. Proc., secs. 409, 1256; *Roach* v. *Riverside Water Co.,* 74 Cal. 263.) Actual notice was confessed by plaintiff.

PATERSON, J.—This action was commenced on July 29, 1887, to enjoin the defendant from building a dam across San Moteo Creek. Plaintiff alleged that on January 1, 1887, Mary Drinkhouse, the owner of the premises, leased them to him for the period of one year, with the privilege of five years from the expiration thereof; that he went into possession, and on the nineteenth day of April, 1887, a written lease was entered into, by the terms of which he was to have the possession and use of the property for the term of five years from said nineteenth day of April; that defendant was constructing a dam below said premises, which, when completed, would throw water back upon them and permanently deprive him of the use thereof.

The court found that the verbal lease, made as alleged by plaintiff, was by mutual consent canceled on April 19, 1887, and the written lease entered into as alleged, but that no change was made in the possession or use of the property; that said Mary Drinkhouse is the mother

of plaintiff, and continued to occupy and use the premises, and he continued to live with her, as he had theretofore done from his birth; that on February 28, 1887, and while said Mary Drinkhouse was the owner of a tract of land including the premises described in the complaint, defendant herein commenced an action against her and J. A. Drinkhouse, her husband, for the condemnation of said tract of land to public use, and duly filed in the recorder's office a notice of the pendency thereof, and that a decree in its favor was entered July 27, 1888; that during the trial of said action, plaintiff herein was present as a witness and acting on behalf of the defendants therein, but never until after the entry of the decree therein made any claim to any interest in the property.

We think that the evidence supports these findings, and that the conclusions of law drawn by the court below are warranted by the facts found. The plaintiff lived in San Francisco with his parents, and testified that he lived "six days of the week in San Francisco, and one day in San Mateo"; that he never fitted up the place as a lodging-house, but put in a few tables, chairs, and blankets; that he had no servants or employees there, and that the foreman, who had been in the employ of his mother, continued to live in the building. He admits that when he entered into the written lease he knew that a suit was pending in which the water company was seeking to condemn the land. His verbal lease for one year was canceled six weeks before the condemnation suit was commenced. He knew that such a suit was pending,—was in fact an active participant on behalf of his parents against the claim of the company.

Under section 1246 of the Code of Civil Procedure, the plaintiff herein was authorized, though not named as a party to the condemnation proceedings, to appear, plead, and defend his interest as a lessee, if any such be held, "in like manner as if named in the complaint," and having failed to do so, although he had notice of the

proceeding,—assuming that he was a lessee in good faith, which the court evidently did not believe,—he is now estopped, by the judgment in that proceeding, from claiming anything by virtue of his written lease, entered into subsequent to the filing of the *lis pendens*. (*Roach* v. *Riverside Water Co.*, 74 Cal. 263; Civ. Code, sec. 3529; *Miller* v. *White*, 80 Ill. 580; Wells on Res Adjudicata and Stare Decisis, sec. 32.)

The court did not err in its ruling against the objections of plaintiff to the admission of the judgment roll and *lis pendens*.

The court found on all the material issues. Some of the material allegations of the complaint were not denied. It was not necessary, therefore, to find in relation to them.

Judgment and order affirmed.

SHARPSTEIN, J., MCFARLAND, J., THORNTON, J., and BEATTY, C. J., concurred.

[No. 12340. In Bank.—December 22, 1890.]

WILLIAM WINTER ET AL., APPELLANTS, *v.* DUGALD MCMILLAN, RESPONDENT.

APPEAL—NOTICE—JOINDER OF PARTIES.—An appeal from a judgment, and from an order denying a new trial, may be taken by one notice, although all of the parties to the former fail to appeal from the latter; and a notice stating who are appellants and what they respectively appeal from is sufficient.

ID.—DOUBLE APPEAL—UNDERTAKINGS—CLERK'S CERTIFICATE—DISMISSAL.—A motion to dismiss such appeals on the ground that but one undertaking was filed, instead, of two, will be denied, where there is nothing to contradict the clerk's certificate that "sufficient undertakings on appeal in due form were properly filed."

POWER OF ATTORNEY—CONVEYANCE TO ATTORNEY IN FACT—FRAUD UPON PRINCIPAL.—A power of attorney authorizing the sale of real estate does not authorize the attorney in fact to give away the property, or to convey it to himself and wife for a nominal consideration, and such a conveyance is a fraud on the principal, and a nullity.

QUIETING TITLE—BURDEN OF PROOF.—In an action to quiet title, the burden rests upon the plaintiff to show title in himself, and if he fails to make out a case, he is not entitled to recover.

ID.—CROSS-COMPLAINT — EQUITABLE TITLE.—A cross-complaint is proper in an action to quiet title, when it seeks to enforce an equitable title against the plaintiff as the holder of the legal title.

ID.—EXECUTION SALE OF BENEFICIAL INTEREST—PLEADING.—Where the defendant in an action to quiet title has acquired the beneficial interest of the owner of the equitable title, by an execution sale, he is entitled to have it adjudged to him in the action; but in order to have it so adjudged, he must state the facts as fully in his cross-complaint as they should be stated in a bill in equity.

ID.—FAILURE TO ANSWER CROSS-COMPLAINT—HOMESTEAD—WAIVER. —In such action, evidence that the plaintiff's grantors had declared a homestead on the property is inadmissible, where the grantors have, by failure to answer the cross-complaint, waived any claim under the homestead declaration.

ID.—LIEN OF PLAINTIFF—TESTING VALIDITY BY CROSS-COMPLAINT.— Where the plaintiff alleges title in himself he cannot recover by showing simply a lien without possession or right of possession; but the defendant may, by cross-complaint, test the validity of a lien claimed by the plaintiff, if he alleges that the property which he has purchased at execution sale was conveyed to the plaintiff by the execution debtor merely to secure him against liability on a bond, and that no liability was incurred by plaintiff.

ID.—PARTIES—BENEFICIARY IN POSSESSION—EXECUTION SALE.—The defendant may, by his cross-complaint, bring in whatever parties are necessary to a determination of the controversy; and where the defendant claims under an execution sale of the interest of a beneficiary in possession, for whose benefit the plaintiff holds the legal title, such beneficiary is a proper and necessary party, and may be brought in by the cross-complaint.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order denying a new trial.

The facts are stated in the opinion of the court.

R. Percy Wright, for Appellants.

A cross-complaint is not proper in an action to quiet title. (Civ. Code, sec. 438, 442; *Wilson* v. *Madison,* 55 Cal. 8; *Germania S. Soc'y* v. *Wagner,* 61 Cal. 349; *Miller* v. *Luco,* 80 Cal. 261.) New parties cannot be introduced by cross-complaint. (*Harrison* v. *McCormick,* 69 Cal.

616; *Niagara Mining Co.* v. *Bunker Hill Mining Co.,* 59 Cal. 612; *Shields* v. *Barrows,* 17 How. 417; Story's Eq. Pl., sec. 389; Daniell's Chancery Practice, 1647.) The demurrer to the cross-complaint should have been sustained. A cross-complaint must state all the requisite facts, to entitle the defendant to affirmative relief. (*Kreichbaum* v. *Melton,* 49 Cal. 50; *Brodrib* v. *Brodrib,* 56 Cal. 563; *Coulthurst* v. *Coulthurst,* 58 Cal. 239.) The allegation that the defendant is the owner, and entitled to possession as against the plaintiffs, is merely a conclusion of law. (*Turner* v. *White,* 73 Cal. 299; *Haven* v. *Seeley,* 59 Cal. 494; *Hutchinson* v. *McNally,* 23 Pac. Rep. 132.) It was error to exclude plaintiffs' declaration of homestead. (*Graves* v. *Baker,* 68 Cal. 133.) The deed executed by Helbing, as attorney in fact, to himself and wife, was erroneously admitted. The power of attorney was not properly acknowledged by Betty Bungen as a married woman. (Civ. Code, sec. 1094.) The deed was void. (*Boyd v. Blankman,* 29 Cal. 34; 87 Am. Dec. 146; *Mischoud* v. *Girod,* 4 How. 503; *Davis* v. *Rock Creek L. & W. Co.,* 55 Cal. 359; 36 Am. Rep. 40; 2 Perry on Trusts, 2d ed., sec. 602.) As all parties claim under Betty Knutsden, no proof of title previous to her was required. (*Whitman* v. *Steiger,* 46 Cal. 258; *Spect* v. *Gregg,* 51 Cal. 198; *Whissenhunt* v. *Jones,* 78 N. C. 361; *Ives* v. *Sawyer,* 4 Dev. & B. 51.) The parol evidence of the admission of plaintiff as to a less interest than a fee simple was inadmissible. (1 Phillips on Evidence, Cowen and Hill's and Edwards's Notes, 349; Abbott's Trial Evidence, 710; *Frink* v. *Roe,* 70 Cal. 296.) The judgment awards affirmative relief not authorized by the pleadings, and is therefore erroneous. (*Hungarian Hill G. M. Co.* v. *Moses,* 58 Cal. 168.)

W. B. Tyler, and *D. H. Whittemore,* for Respondents.

Two separate and distinct appeals cannot be taken by a single notice or undertaking. (*People* v. *Center,* 61 Cal.

192; *Sweet* v. *Mitchell,* 17 Wis. 125; *Noble* v. *Strachan,* 32 Wis. 317; *White* v. *Appleton,* 14 Wis. 190; *Skidmore* v. *Davies,* 10 Paige, 316.) A deed by an agent to himself is not void, but only voidable, and cannot be avoided by the agent or his grantee. (Story's Eq. Jur., sec. 316; *Rubidoex* v. *Parks,* 48 Cal. 217; *Kisling* v. *Shaw,* 33 Cal. 439; 91 Am. Dec. 644.) There is no proof that Beta Gade ever had title. The property belonged to the Helbings, who had the actual possession, which is *prima facie* evidence of title. The plaintiffs are mere mortgagees out of possession, having no title, and cannot sue to quiet title. (*Jackson* v. *Lodge,* 36 Cal. 43; Code Civ. Proc., sec. 744.) A cross-complaint is proper when affirmative relief against the plaintiff is sought respecting the property to which the action relates. (Code Civ. Proc., sec. 442; *Lynch* v. *Brigham,* 51 Cal. 491; *Hills* v. *Sherwood,* 48 Cal. 392.) The Helbings were proper parties plaintiff, and it was proper to bring them in by the cross-complaint. New parties may be added by a cross-complaint which is filed for affirmative relief. (*Brandon Mfg. Co.* v. *Prince,* 14 Blatch. 371; *Jones* v. *Smith,* 14 Ill. 229.)

PATERSON, J.—This action was brought against the defendant, McMillan, to quiet the title of the plaintiffs, Winter and Wright, to a lot of land in San Francisco. The defendant answered, denying that the plaintiffs were the owners of or had any interest in the land, and at the same time filed a cross-complaint which alleges, in substance, that plaintiffs never had any interest in the property, except the naked legal title, which was conveyed to them by Louis and Louise Helbing, on June 3, 1881, without consideration, and with intent to hinder, delay, and defraud the creditors of said grantors; that G. Henninger and wife recovered judgment against the said Louis Helbing for the sum of three thousand five hundred dollars, and costs, November 11, 1881, in an

action for damages commenced April 30, 1881; that thereafter the property in controversy was sold to defendant on execution issued on said judgment, and in due time the sheriff executed and delivered to him a deed therefor; that the deed of the Helbings to plaintiffs was given to secure the latter against any damages they might sustain by reason of their becoming sureties on a penal bond given by said Louis Helbing, but no liability was incurred by plaintiffs on said bond; that the title still stands on the records in the name of the plaintiffs, but the said Helbings have continued to hold and now are in possession of the land, claiming some interest therein; that the controversy as to the title to the land cannot be settled without having the said Helbings before the court; that defendant is the owner of the property, and entitled to the possession of the same. The prayer of the cross-complaint is, that the Helbings may be brought in by summons and required to show what right, if any, they have to the property, and for a judgment that neither plaintiffs nor the Helbings have any right, title, or interest in or to the land in controversy. By order of the court, a summons was issued and served on the Helbings, but it seems that they made no appearance. The plaintiffs filed a demurrer, which was overruled. They then filed an answer, denying all the allegations of the cross-complaint, and alleging that Louis Helbing had never had any right, title, or interest in the property, except such as he derived from a claim of homestead, which interest was exempt from execution and forced sale.

The court found that plaintiffs were not the owners of or entitled to the possession of the property; that the Helbings were the owners of the property on June 3, 1881, when they deeded the same to plaintiffs simply to secure them against any liability as sureties, and that no liability had been incurred on the bond; that defendant purchased the property at execution sale, as alleged by him,

and is the owner thereof. Judgment was entered in accordance with the findings. Plaintiffs moved for a new trial, which motion was denied. Thereupon the Helbings united with the plaintiffs in a notice of appeal from the judgment, which notice included also a notice of appeal by the plaintiffs from the order denying their motion for a new trial.

The respondents have moved to dismiss the appeal, on the ground that the appellants could not properly unite two separate and distinct appeals in one notice and in one undertaking.

An appeal from a judgment, and from an order denying a motion for a new trial, may be taken by one notice. The notice states who are appellants and what they respectively appeal from. This is sufficient. The clerk certifies that "sufficient undertakings on appeal in due form were properly filed." There is nothing to contradict the fact stated. The motion to dismiss is denied.

It does not clearly appear what is the basis of plaintiffs' claim of title. They did not trace it back to any paramount source. The burden of showing title in themselves rested upon the plaintiffs, and they failed to make out a case. They showed that on November 10, 1879, Beta Gade gave Louis Helbing a power of attorney authorizing him to sell her real estate, and that on June 15, 1880, A. Hensler and his wife, Mary, made a quitclaim deed of the property to Beta, who was a sister of Mrs. Helbing. What connection, if any, Mary had with the title does not appear, except that she had employed Helbing to put buildings on the land in February, 1878, and the only evidence that Beta ever owned or had possession of the property is, that "she walked over it," and "looked at it." Both Beta and Mary were in San Francisco at the time of the trial in the court below, but neither was called as a witness. On June 28, 1880, Louis Helbing, acting as attorney in fact for Beta Gade, for a nominal consideration sold and conveyed the property

to himself and wife. On June 3, 1881, Beta and her husband made and delivered to plaintiffs a deed of the property, which was absolute in form, and on the same day Helbing and wife executed to plaintiffs a similar instrument. A few days later, plaintiffs and the Helbings exchanged documents acknowledging that plaintiffs held the property in trust for two purposes; viz.: "to secure them against any loss which they might sustain by reason of their having become sureties on the bond above referred to, and to secure to plaintiff Wright payment for professional services which he had rendered, and should thereafter render, in certain proceedings." Plaintiff Wright did not prove what, if any, fees were due to him for services renderd. One of the bonds has been exonerated, and it does not appear that any liability has accrued on the other.

The basis of the defendant's claim of title is quite as uncertain as the plaintiffs'. The judgment under which he purchased the property at execution sale on June 9, 1884, was entered November 11, 1881. Under that purchase he took whatever right, title, and interest the Helbings had in the property at the date of the judgment. Helbing's deed of July 28, 1880, to himself and wife, is void. The power of attorney did not authorize him to give away the property, or to convey it to himself for a nominal consideration. His act was a fraud on the principal, and the conveyance is a nullity. (Code Civ. Proc., sec. 2306; *Dupont* v. *Wertheman,* 10 Cal. 368; *Randall* v. *Duff,* 79 Cal. 115.) It is true, the evidence tends to show that Helbing was the real owner of the property, and that the conveyances were made to mislead somebody,—probably creditors. He received but a few hundred dollars for two three-story houses. Soon after the houses were built, the Helbings went into possession of the property, and have ever since occupied the same. The plaintiffs promised to reconvey to the Helbings,—not to Beta. The Helbings then filed a home-

stead declaration on the property. They were heavily in debt. There are many circumstances connected with the transaction tending to show an attempt on the part of all parties to conceal the identity of the real owner. But the defendant himself offered a lease from Beta Gade to Mary Hensler, dated March 1, 1878, by the terms of which the premises were leased to the latter for a term of five years. He also offered in evidence the power of attorney from Beta Gade to Helbing, and the deed executed by the latter to himself and wife, insisting that the latter was not void. The defendant could not thus affirm title in Beta Gade in support of his own title, and deny it in answer to plaintiffs' claim of title under the same source; he could not do so consistently, at least. If Beta was the owner of the property, the title passed to the plaintiffs herein by her deed of June 3, 1881, several months prior to the entry of the judgment against the Helbings. But as stated before, it is impossible to tell, from the evidence offered by the respective parties, what is the basis of the claim of either. The most that plaintiffs can claim, under the evidence introduced by them, is a lien for the value of services rendered by the plaintiff Wright, and for any liability which may have accrued on the bond which has not been exonerated. If Helbing was the beneficial owner at the time defendant purchased at execution sale, the latter took all his right, title, and interest, and is entitled to have the same adjudged to him. To do this it will be necessary for the defendant to amend his cross-complaint so as to state the facts more fully,—as fully as they are required in a bill in equity. (*Kreichbaum* v. *Melton,* 49 Cal. 50; *Brodrib* v. *Brodrib,* 56 Cal. 563.)

Plaintiffs offered to prove that Mrs. Helbing had declared a homestead on the property June 29, 1880, but the evidence was excluded. We do not think the court erred in its ruling. The fact that the Helbings claimed a homestead could not aid the plaintiffs as against the

defendant. The Helbings had, by their failure to answer defendants' cross-complaint, waived, as against the defendant, any claim under the homestead declaration, and their conveyance to the plaintiffs did not give to the latter any homestead right in the property.

Appellants contend that the demurrer to the cross-complaint ought to have been sustained; that a cross-complaint is improper in actions of this kind. In support of this contention, they cite *Wilson* v. *Madison,* 55 Cal. 8. All that case decides is, that where the relief demanded by defendant can be had upon the denials and averments of his answer, a cross-complaint is unnecessary. But there may be cases in which full relief cannot be given the defendant upon answer, and as in ejectment, a cross-complaint in such cases is recognized as a proper pleading, so that the whole controversy may be settled in one action; so here we see no objection to a cross-complaint upon the allegations of which, supported by proof, the defendant may take from plaintiff that which he would recover in equity; viz., the legal title. Section 442 of the Code of Civil Procedure provides that "whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint."

Here the affirmative relief which the defendant is seeking certainly affects the property to which the action relates, and we think that the cross-complaint was a proper pleading. The plaintiffs claim the whole title. They could not maintain the action by showing simply a lien without possession or right of possession. But if the court denied their prayer because they showed at

most only a lien, the validity of the lien could be determined in another action. Why not allow the defendant, upon proper averments in his cross-complaint, to test in this action the validity of the lien claimed by plaintiffs? In other states it is held that cross-complaints in these actions are proper pleadings. (*Ludlow* v. *Ludlow,* 109 Ind. 199, and cases cited; *Venable* v. *Dutch,* 37 Kan. 515; *Allen* v. *Tritch,* 5 Col. 228; *Greenwalt* v. *Duncan,* 16 Fed. Rep. 612.)

But it is claimed that if it be conceded that a cross-complaint is a proper pleading in actions of this nature, new parties cannot be brought in by it. Whether this could be done under the old chancery practice is a question upon which the authorities are not agreed; but our code system is much broader and more liberal in this regard. The defendant is not, under our practice, confined in his cross-complaint to matters charged in the complaint. Thus in ejectment, as stated before, he may plead matters purely equitable, and secure equitable relief. Besides this, our statute provides that "when a complete determination of the controversy cannot be had without the presence of other parties, the court must order them brought in." (Code Civ. Proc., sec. 339.) A complete determination of this controversy, if the allegations of the defendant and the findings of the court are correct, could not be had without making the Helbings parties. The plaintiffs appeared to be and claimed to be the owners in fee. The Helbings were in possession. The defendant was entitled to the possession if the Helbings owned the property when the judgment was entered. A trial between the plaintiffs and defendant would have settled only half of the controversy, and it would have become the duty of the court, we think, when the facts appeared in evidence, to order the Helbings brought in as parties to the action. (*O'Connor* v. *Irvine,* 74 Cal. 443.) In other states it is held that in a proper case third parties may be brought in to answer

the defendant's cross-complaint. (*Allen* v. *Tritch,* 5 Col. 228; *Bunce* v. *Bunce,* 59 Iowa, 534.) Appellants rely upon the case of *Harrison* v. *McCormick,* 69 Cal. 618. In that case there was no necessity for a cross-complaint; the claim was for damages,—purely a counterclaim,—in which case, of course, the demand "must be one existing *in favor of defendant and against a plaintiff, between whom a several judgment might be had in the action.*" (Code Civ. Proc., sec. 438.)

In this case a cross-complaint is proper to determine the question as to the validity of plaintiffs' lien. If the obligations of the bond have ceased, and no money is due Wright for professional services, the defendant is entitled to have those facts determined, and to receive whatever affirmative relief he may prove himself in equity entitled to. If the Helbings claim a homestead upon the property, it is proper that they should be given an opportunity to present the same, so that the rights of all parties interested, or claiming an interest, may be settled in one suit.

The record shows that the summons issued on the cross-complaint was duly served on the Helbings, but is silent as to whether any appearance was made by them. We presume, of course, that no answer was filed; but if they failed to appear and demur or answer within the time allowed by law, their default therefor ought to have been entered, and a memorandum of such default indorsed on the cross-complaint. (Code Civ. Proc., sec. 670.)

The judgment is reversed, and the cause is remanded for a new trial, with directions to the court below to permit the parties to amend their pleadings in any respect consistent with the nature of the action.

FOX, J., SHARPSTEIN, J., and MCFARLAND, J., concurred.

BEATTY, C. J., concurred in the judgment.

[No. 13709. In Bank.—December 22, 1890.]

THEODORE HAVEMEYER ET AL., PETITIONERS, *v.* THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, WILLIAM T. WALLACE, JUDGE, RESPONDENTS.

CONTEMPT—DISOBEDIENCE TO WRIT OF PROHIBITION—ACTION OF RECEIVER—NEGLECT OF JUDGE.—After service of an alternative writ of prohibition commanding a superior judge, and a receiver appointed by him, to desist from interfering with the possession of property or the conduct of business in the hands of strangers to the suit, claiming title thereto, if the receiver continues to interfere with their possession and the conduct of their business, and attempts to oust them therefrom, and the superior judge neglects his duty to see that the receiver obeys the writ, each is guilty of contempt in disobeying the alternative writ.

ID.—SCRAMBLING POSSESSION—VOID ORDER.—Where, prior to the service of the writ, the receiver has only acquired a mixed and scrambling possession of the property, and the order appointing him is void, any further attempts by him to take and hold possession cannot be justified under the plea that possession had been fully taken, and that nothing was done after service of the writ except to preserve the *status quo*.

ID.—JURISDICTION—GOOD FAITH—TECHNICAL CONTEMPT—NOMINAL FINE.—Where the acts of the receiver and of the judge depended for their validity upon the jurisdiction of the judge to appoint the receiver, and they were erroneously advised that the possession of the receiver was lawful and complete, and that he must maintain it, notwithstanding the service of the alternative writ of prohibition, and that the judge could not interfere with or control his acts, pending the hearing of the cause, and each of them acted in good faith upon such advice, and neither intended any disrespect of the court, such good faith, though it cannot wholly relieve them of the contempt of which they are technically guilty, will perclude their being punished otherwise than by a nominal fine.

CONTEMPT proceedings against William T. Wallace, judge of the superior court of the city and county of San Francisco, and Patrick Reddy, receiver, for alleged disobedience to an alternative writ of prohibition. The facts are stated in the opinion of the court, and in the opinion in *Havemeyer* v. *Superior Court,* 84 Cal. 327.

Wilson & Wilson, and *Garber, Boalt & Bishop,* for Petitioners.

William T. Wallace, in propria persona, Sullivan & Sullivan, W. H. Metson, and *Robt. Mitchell,* for Respondents.

BEATTY, C. J.—The application for a peremptory writ of prohibition herein, and the charge that the judge of the superior court and his receiver had violated the injunction contained in the preliminary or alternative writ, and had thereby committed a contempt, were heard and submitted together. In our opinion, filed at the time of deciding the cause (see 84 Cal. 327), we stated very fully all the facts necessary to be considered in deciding upon the charge of contempt, excepting only those relating to the character and extent of Mr. Reddy's possession of the refinery, etc., at the time he was served with the alternative writ.

Avoiding, as far as possible, any repetition of that statement, we proceed to consider whether the charge of contempt has been made out.

That Mr. Reddy did interfere with the possession and control, by petitioners, of the refinery and other property claimed by them in their own right, and described in our writ, that he did interfere with the conduct and business of the same, and that he did continue to exercise, with respect thereto, all the powers granted in the order appointing him receiver, after service of our writ, is conceeded, and it is also conceded that the judge of the superior court, after like notice, entirely and purposely abstained from any interference with his proceedings.

But it is contended in behalf of the receiver that before he had any notice of our order he was in complete and absolute possession of all the property claimed by the respondents, and that his subsequent dealings with it were only such as were necessarily incumbent upon him by reason of such possession. In behalf of the judge, it is claimed that the effect of our writ was to deprive him of all control and direction of the receiver, and consequently to absolve him from any responsibility for his acts.

This claim of exemption from responsibility on the part of the judge cannot be allowed. The object and purpose of our order and writ, expressed in the plainest terms (84 Cal. 351), was to restrain the action of the court. It was addressed directly to the judge, and only indirectly, through him, to the receiver. Both were bound by it, but it was nevertheless the duty of the principal to see that the agent obeyed it; and whatever the receiver did in violation of its terms, the judge must answer for, if, with knowledge of his agent's proceedings, he refrained from exercising his undoubted power to control them. And such, as we have seen, is the case.

The whole matter to be determined, therefore, is the correctness of the receiver's position; i. e., that he was in full possession before he had any notice of the injunction, and that he did nothing thereafter except to preserve things *in statu quo*.

He contends that from the afternoon of February 17th he was in full, complete, and absolute possession of the refinery, shops, and offices, and was only impeded and interrupted in his control of some of the personal property therein.

The assumption, however, upon which he builds his entire argument is, that he was acting under a valid appointment, and had a lawful right to do everything that he attempted to do; and since its basis is swept away, there is little left of the argument. We have decided—and we have no doubt of the correctness of that decision—that the appointment of Mr. Reddy, and all the proceedings in the matter of the receivership, were void. Therefore, when he entered into the refinery, shops, and offices, he did so as a mere trespasser, without any lawful warrant whatsoever, and all his acts in attempting to obtain possession must be viewed in that light.

We do not wish to be understood as conceding that Mr. Reddy's acts, even if his appointment had been valid,

would have been entirely justifiable. We are not called upon to decide how summarily a receiver lawfully appointed may proceed in wresting the possession of property, specifically described in the order appointing him, out of the hands of strangers to the action, claiming it in their own right. We had supposed that in such case it would be his duty to abstain from the exercise of anything like force; that if he found the claim of ownership and possession by a third party to be made in good faith, he would report the matter to the court, and if he proceeded further, do so only by an action for the recovery of the property. If he was satisfied that such claim was a sham, and the possession by such stranger held by collusion with (or as a mere agent or servant of) a party bound by the order, that he would still report the facts to the court, and have the persons resisting his authority cited to answer for contempt; and that after hearing upon the citation, the court would not, unless in a plain case, order a writ of assistance to dispossess such parties, but would direct an action to be brought, so that their rights might be fully and fairly litigated.

But, as we have said, these are matters which we are not called upon to decide here, and we have given this very general expression of our views only in order not to seem to acquiesce in the proposition so strenuously urged by counsel, to the effect that in the case supposed it is the right and duty of the receiver to take the property regardless of the claims and possession of third parties; that it is their duty to yield unquestioning obedience to his commands, surrender possession of the property, and petition the court for leave to sue for its recovery.

The question here is much simpler; it is, whether Mr. Reddy and his men, regarded as mere naked trespassers, entering without any sort of lawful warrant, had, prior to the hour of three o'clock, P. M., on February 18th, succeeded in ousting the petitioners from their lawful pos-

session of the refinery, shops, etc., and in gaining so full and complete a possession themselves as to justify their subsequent proceedings. The testimony bearing upon this point is quite voluminous, and to some extent conflicting, though not more so than might naturally have been expected, considering the opposite points of view from which the occurrences at the refinery were viewed by those who participated in and have testified regarding them.

It appears that Mr. Reddy, armed with the commission from the superior court, and attended by a number of men, acting in obedience to his orders, entered the refinery on the afternoon of February 17th, stated the authority under which he assumed to act, declared himself in possession, ordered the superintendent of the works to shut them down, disposed his men about the building, and stopped the delivery of sugar then in progress. The superintendent, however, refused to take any orders from Mr. Reddy, referred him to Mr. Mott, the general agent of the petitioners, and asserted their claims to the property. There is no doubt that the superintendent and his foreman were, to some extent, intimidated by the sudden irruption of Mr. Reddy and his men, and the threat of arrest and punishment if they refused to submit, and, no doubt, they did make use of various temporizing expedients in order to maintain their ground without resorting to open and violent resistance; but they neither left the building nor acknowledged Mr. Reddy's authority.

The dispute ended at last in a sort of truce for the night, both parties remaining on the ground, the superintendent being allowed until next day to take legal advice and determine whether he would yield the possession or not. Acting upon the advice he received, the superintendent notified Mr. Reddy the next day that he would continue to resist him by all means short of force, whereupon Mr. Reddy applied to the court for the

assistance of the sheriff. In the affidavit which he presented to the court for that purpose, and which was, as is evident, framed upon his theory as to the validity of his appointment and the entire regularity of his proceedings, he states that he has entered into possession of the refinery, but that H. C. Mott and R. H. Sprague (the general agent and superintendent of petitioners) are impeding, hindering, and delaying him in the discharge of his duties as receiver, and are refusing to allow him to take into his possession and control certain property situate on the premises. This affidavit, as an assertion of possession, is almost *felo de se* in itself, and would have been quite so if it had disclosed the further and undisputed fact that Mott and Sprague were really impeding and hindering the receiver by their assertion of, and their attempt to uphold, the possession and right of the petitioners. Evidently, too, the superior judge attached less importance to the legal conclusion stated in the affidavit than to the facts by which it was qualified; for, by the terms of his order to the sheriff, that officer was commanded to do what was necessary to place Mr. Reddy in exclusive, full, and complete possession.

The sheriff, in the return which he subsequently made of this order, seems to have fallen back on the theory of the affidavit, that Mr. Reddy was in possession of the refinery, though impeded and interfered with by certain persons whom he found on the premises, and who at his request retired therefrom, leaving Mr. Reddy in peaceful, undisturbed, and undisputed possession. He does not disclose who these persons were, but the testimony shows that the superintendent and foreman of the refinery were meant.

When Mr. Reddy and the sheriff came back, on the 18th, armed with a new order, Mr. Sprague and his foreman did retire from the building, in obedience to their demand, but almost immediately returned. There is a

conflict of testimony as to the terms upon which they re-entered. Mr. Reddy's testimony—in which he is corroborated by others—is, that they came back at his request, to take care of the large amount of sugar then in solution, under a promise to obey his orders and shut down the works as speedily as that could be done without too serious loss. They, on the other hand, claimed that they only promised not to oppose Mr. Reddy's orders, and declared their purpose to remain on the premises in the interest of the petitioners, and in their pay. It is not necessary, in our opinion, to reconcile this conflict in the testimony, which in all probability is mainly due to the different construction given by the two parties to what was actually said. We will assume that the arrangement was such as Mr. Reddy states it to have been, for even then he did not get complete possession. The only two persons removed from the premises, or who acknowledged Mr. Reddy's authority, were Mr. Sprague and his foreman. Mr. Mott, the general agent, was in a position of authority over them, and over more than a hundred other employees then on the premises, none of whom were removed, and none of whom ever received or obeyed any order from Mr. Reddy before he was enjoined, and all of whom continued thereafter in the pay and service of the petitioners. Mr. Mott, it is true, was not at the refinery while the sheriff was there; but he had been there before, resisting Mr. Reddy, and he returned afterwards, and renewed his resistance, so that Mr. Reddy was compelled to remove him by force (a very gentle force, it is true, but it would no doubt have been greater if there had been greater resistance). In the mean time, Mr. Reddy had been served with our writ, and Mr. Sprague had disclaimed his authority, and, contrary to his orders, had put a large additional amount of sugar in solution.

These being the facts, it is clear that there was, in the best view for the respondents, a mixed and scrambling

possession of the refinery, in which case the legal seisin, as it always does, attached itself to the right of possession.

The result was, that Mr. Reddy found himself in the position of being obliged to decide, at his peril, whether his authority was valid or not; and as soon as service was made upon the superior judge, at a later hour on the same day, he was placed in the same position. A copy of the petition for the writ of prohibition, our order for the writ, and the writ itself, were all served together, and by them the respondents were fully advised that the validity of their proceedings was challenged upon jurisdictional grounds, and that until our further order, they must suspend their proceedings against the property described in the writ. Their claim to be in possession of the refinery, and especially their right to discharge the superintendent of the petitioners and put another in his place, stop the delivery of sugar and close down the works, depended upon the jurisdiction to appoint a receiver. If that proceeding was void, they were bound to withdraw from the refinery, shops, office, etc., and leave the petitioners unmolested. If, on the other hand, the appointment of the receiver was valid, they might maintain the *status quo,* and perhaps were justified in doing the other things above mentioned. Being in this situation, they did right in taking legal advice; but the fact that they did so, and acted upon it in good faith, does not wholly relieve them from the consequences of the actual disobedience of which they were guilty.

They were advised that the possession of the receiver was lawful and complete, and that he must do all that he subsequently did. They were also advised that the superior judge could not interfere with or control the acts of the receiver pending the hearing of the cause. This advice was erroneous; but we have no doubt that it was given, accepted, and acted upon in good faith, and therefore that the respondents, though technically guilty of contempt, did not intend any disrespect to the court,

or any infraction of its orders, and that they should not be punished otherwise than by a nominal fine.

The finding of the court is, that William T. Wallace, judge of the superior court, and Patrick Reddy, Esq., did on the eighteenth day of February, 1890, and on various days thereafter, violate our injunction herein issued and served on said eighteenth day of February, 1890, by continuing in and about the refinery and other property in said writ described, and by interfering with the petitioners in the conduct of their business therein, and did thereby disobey our lawful order and writ, and were therein guilty of a contempt of this court.

Wherefore it is ordered that said William T. Wallace and Patrick Reddy be and each of them is hereby fined in the sum of ten dollars.

FOX, J., SHARPSTEIN, J., MCFARLAND, J., and PATERSON, J., concurred.

THORNTON, J., dissenting.—I dissent. There is no evidence of contempt committed by either party in this case.

[No. 13976. Department Two.—December 22, 1890.]

JESSE W. WOODRUFF ET AL., RESPONDENTS, *v.* THE SEMI-TROPIC LAND AND WATER COMPANY, APPELLANT.

VENDOR AND PURCHASER—CONTRACT OF SALE—TIME OF ESSENCE.—Time is of the essence of a contract for the sale of land, which provides that the consideration is to be paid in installments at stated times, that a good and sufficient deed is to be delivered upon receiving the payments at the times and manner agreed upon, and that in the event of a failure to comply with the terms of the contract by the vendees, the vendor is to be released from all obligations to convey the property, and the vendees are to forfeit all rights thereto.

ID.—DEFAULT OF VENDOR—DEMAND—OFFER OF PERFORMANCE—RESCISSION BY VENDEES—RECOVERY OF PURCHASE-MONEY.—Where time is of the essence of the contract, and the vendor fails

and neglects to execute the conveyance required by the contract after demand therefor, and an offer in writing by the vendees to pay the last installment of purchase-money, the vendees may rescind the contract, tender a reconveyance of their rights to the vendor, and surrender the possession, and demand and recover back the installments of purchase-money paid.

ID.—SUBSEQUENT OFFER OF VENDOR TO PERFORM.—After the vendees have rescinded the contract for the default of the vendor, and tendered restitution, and demanded a repayment of the installments of purchase-money paid, no subsequent offer of performance on the part of the vendor will relieve him from the effect of his default; and the vendees are not bound to accept an offer of performance made by the vendor after suit brought for the recovery of the purchase-money, and before service of the summons therein.

APPEAL from a judgment of the Superior Court of San Bernardino County.

The facts are stated in the opinion.

Willis, Cole & Craig, for Appellant.

Smith & Northrup, for Respondents.

FOOTE, C.—The plaintiffs obtained judgment against the defendant for the sum of $3,405.75, and costs. From that judgment this appeal is prosecuted on the judgment roll.

The parties hereto entered into the following contract:—

"This agreement, made and entered into the twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-seven, between the Semi-Tropic Land and Water Company, a corporation, party of the first part, and Jesse W. Woodruff and George E. Baldwin, of the city and county of San Bernardino, state of California, the parties of the second part, witnesseth,—

"That said party of the first part, in pursuance of a resolution of the board of directors of said corporation, duly passed, authorizing this agreement, and in consideration of the covenants and agreements on the part of the said parties of the second part hereinafter contained, agrees to sell and convey unto the said parties of the second

part all that certain lot or parcel of land situated in the county of San Bernardino and state of California, and bounded and more particularly described as follows, to wit: Farm block 28, containing 20.6 acres (more or less) in accordance with the map of the town of Rialto and adjoining subdivisions, as recorded in the office of the recorder of deeds in and for San Bernardino County, California, ——, 18—, book —, page —.

"The party of the first part reserves from the premises above agreed to be sold the right of way to enter upon, to ditch, and to lay pipes for the distribution of water. And the said party of the first part agrees to sell said property for the sum of four thousand twelve dollars, gold coin of the United States, and the said parties of the second part, in consideration of the premises, agree to pay to said party of the first part, the said sum of four thousand twelve dollars, gold coin, as follows, to wit: thirteen hundred thirty-eight dollars cash, on delivery of this agreement, receipt of which sum is hereby acknowledged by party of the first part; thirteen hundred thirty-seven dollars on or before August 25, 1888; thirteen hundred thirty-seven dollars on or before August 25, 1889, with interest payable semi-annually upon the deferred payments at the rate of eight per cent per annum; and if any part of the principal or interest be now [not] paid when due, it shall thereafter bear interest at the rate of twelve per cent per annum until fully paid, according to the terms of two certain promissory notes of said second parties, of even date herewith, made in favor of said party of the first part, and payable at the Los Angeles National Bank, in Los Angeles, California.

"And the said parties of the second part agree to pay all state, school, and county taxes or assessments of whatsoever nature which may become due on the premises above described, and all assessments that may be lawfully made upon the shares of water stock herein agreed to be delivered, after the date of this agreement.

"In the event of a failure to comply with the terms hereof by the said parties of the second part, the said party of the first part shall be released from all obligations in law or equity to convey said property, and said parties of the second part shall forfeit all rights thereto. And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, agrees to execute and deliver to the said parties of the second part, or their assigns, a good and sufficient deed of bargain and sale, together with one share of stock in the Lytle Creek Water and Improvement Company for each acre of land above agreed to be sold. The party of the first part also agrees to pipe the water to a point adjacent to each twenty-acre lot of said tract, and to each town lot above agreed to be sold, after which the second parties and other stockholders in said water company must bear the expense of keeping up the water system. And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties."

From the pleadings, it appears that the plaintiffs here (the parties of the second part) paid to the defendant on the 27th of August, 1887, $1,338, on the agreement, and at the same time executed and delivered to it two promissory notes in accordance strictly with the terms of the contract, and at maturity thereof paid the first note, $1,443, principal and interest, and $160.44, being interest on the note due on or before August 25, 1889, and also $13.30, the amount of taxes assessed on the land included in the contract.

On the 26th of August, 1889, when the last note was due, the plaintiffs were ready and willing and offered in writing to pay it and the interest due thereon, and then demanded a good and sufficient deed of bargain and sale of the premises above described, and also that the defendant deliver the water stock included in the purchase. This the defendant failed and neglected to do.

On the twenty-first day of November, 1889, the plaintiffs surrendered possession of the land and premises, and tendered to the defendant a quitclaim deed to the premises and to the water stock, and demanded that the defendant pay back the payments in money that the plaintiffs had made, and interest at lawful rates from the date of making the payments, and that the defendant deliver up the promissory note due August 25, 1889; that the defendant refused to accept the deed of reconveyance or pay the money.

Damages in the sum of three thousand five hundred dollars were prayed for, the rescission of the agreement of August 25, 1887, and that the note due August 25, 1889, be given up and canceled.

A demurrer was filed, and overruled for want of prosecution.

The defendant then answered, denying damage done to the plaintiffs, and setting up the defense that, prior to the service of summons in this case, it was able and willing to deliver a conveyance and the water stock upon the plaintiffs paying the balance of the purchase price, which offer the plaintiffs declined. And the defendant avers that it is still able and willing to carry out the contract upon the payment by the plaintiffs of the contract price for the property.

The court found that all the allegations of the plaintiffs' complaint were true, and that they had suffered damage in the sum of $3,405.75; that before November 29, 1889, the defendant failed and neglected to comply with the contract; that on that day, after the commencement of this action, but before the service of summons, the defendant offered to comply with the contract, but the plaintiffs would not accept it; and that since that date the defendant has been and still is ready to deliver the deed and shares of stock on the payment of the balance due by the plaintiffs. The conclusion of law is, that the plaintiffs are entitled to judgment for $3,405.75, and

costs. Judgment was rendered accordingly on the 17th of June, 1890.

The only point which seems to be made for a reversal of the judgment is, that time was *not* of the essence of the contract, and therefore that the offer of performance on the 29th of November, 1889, was in a reasonable time after the date fixed for performance by the contract, or after suit brought by the plaintiff to rescind.

There is no doubt, however, that time was of the essence of this contract, as is seen by a reference to the opinions delivered in *Grey* v. *Tubbs,* 43 Cal. 364, and *Cleary* v. *Folger,* 84 Cal. 321, where a similar contract was construed with reference to this point.

Time being of the essence of the contract, and the defendant, having failed to comply with it after a tender of performance by the vendee, was in default.

The plaintiffs tendered a deed to the premises, giving all their title thereto, and also the water stock, and surrendered possession of the premises on the 21st of November, 1889, and demanded a repayment back of their money, and the giving up and canceling of their unpaid note. This was all that the plaintiffs were required to do to effect a rescission of the contract, and having done this, no subsequent offer of performance on the part of the defendant would relieve it from the effect of its default. Therefore we advise that the judgment be affirmed.

GIBSON, C., and VANCLIEF, C., concurred.

The COURT.—For the reaosns given in the foregoing opinion, the judgment is affirmed.

[No. 20695. Department Two.—December 23, 1890.]

THE PEOPLE, RESPONDENT, v. PERCY DOUGLASS, APPELANT.

CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON—PRIOR CONVICTION OF FELONY—PLEADING—READING OF INFORMATION—CONSTRUCTION OF MINUTES OF TRIAL.—A statement in the minutes of the trial of a defendant accused of an assault with a deadly weapon and of a prior conviction of a felony, who had pleaded not guilty to the former charge and guilty to the latter, that "the information is read and the plea of not guilty stated to the jury by the clerk," should be construed as a statement that the charge in the information as to the assault only was read, where it does not clearly appear that the whole information was read, and it appearing, from the record, that what was read was in the presence of the defendant, and not objected to, and that the charge as to the assault only was submitted to and passed on by the jury.

ID.—FORM OF VERDICT—GENERAL STATEMENT OF OFFENSE.—A verdict in general terms finding the defendant guilty of an assault with a deadly weapon, under an information charging that the assault was made upon a person named, is in accordance with law, and free from uncertainty.

ID.—FORM OF JUDGMENT—GENERAL RECITAL OF CONVICTION.—The judgment is not rendered insufficient or uncertain by merely reciting that the defendant answered and confessed to a previous conviction of manslaughter, and was convicted in the court of the crime of assault with a deadly weapon, without further statement of particulars.

ID.—MISNOMER OF PERSON ASSAULTED.—Whether in the information the name of the person assaulted was written therein "Daniel Auseon" or "Daniel Anseon," was for the trial court to determine, and the trial court having directed the jury that the name written in the information was Daniel Auseon, this court will not revise the action of such court in so holding.

ID.—ASSAULT UPON BRAKEMAN OF RAILROAD TRAIN—TRESPASS—QUESTION OF FACT.—Where the assault was committed upon the brakeman of a railroad company in his efforts to get the defendant off the train, and there is evidence tending to show that the defendant was not a passenger on the train, but a trespasser thereon, it is a question of fact for the jury whether the defendant was a trespasser or a passenger.

ID.—PRESUMPTION—PASSENGER—TRESPASSER UPON TRAIN.—A person on a car used for carrying passengers is presumed to be a passenger, and rightfully there, but this presumption may be rebutted; and no presumption of law or fact arises where the person is found on a car not used for the accommodation of passengers, and it is for the jury to determine whether such person is a passenger or trespasser upon the train.

ID.—JUSTIFICATION OF ASSAULT.—A trespasser on a train is not justified in shooting a servant of the railroad company who attempts to put him off, when he can with safety get off and avoid the shooting.

ID.—PUNISHMENT OF OFFENSE — PREVIOUS CONVICTION OF MANSLAUGHTER.—An assault with a deadly weapon being punishable upon a first conviction by imprisonment in the state prison for a period of two years, it may be punished under section 266 of the Penal Code by imprisonment therein for any term not exceeding ten years, where there has been a prior conviction of manslaughter.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial.

The verdict of the jury found the defendant guilty of an assault with a deadly weapon. The judgment contained the recital that the "said Percy Douglass, having answered and confessed to a previous conviction of manslaughter, and having been convicted, in this court, of the crime of assault with a deadly weapon, it is therefore ordered, adjudged, and decreed that the said Percy Douglass be punished by imprisonment in the state prison of the state of California, at Folsom, for the term of eight (8) years," etc. Further facts are stated in the opinion of the court.

J. W. Ahern, and *P. Reddy,* for Appellant.

W. E. Tupper, H. H. Welsh, and *S. J. Hinds,* for Respondent.

THORNTON, J.—The defendant was convicted of the crime of assault with a deadly weapon. This appeal is by him from the judgment, and an order denying his motion for a new trial.

Several points are presented and argued on behalf of appellant, which we will proceed to consider.

The defendant was accused, by the information, of assault with a deadly weapon, and of a prior conviction of a felony, viz., manslaughter. On his arraignment he pleaded *guilty* to the prior conviction of manslaughter, and *not guilty* as to the charge of assault with a deadly weapon. When the jury had been impaneled and sworn, it is stated, in the minutes of the trial, that "the infor-

mation is read and the plea of not guilty stated to the jury by the clerk."

It is urged on behalf of defendant that it was error to read the information to the jury. The counsel for defendant construes the statement above quoted as a statement that the whole information was read, including both charges made in it, to one of which, as above stated, defendant had pleaded guilty. We do not so construe the statement taken from the minutes of the trial. We understand it as a statement that the charge in the information as to the assault only was read. It would be entirely unnecessary to read that portion of it in which the prior conviction, to which he had pleaded guilty, was set forth. At any rate, it does not clearly appear that the whole information was read. If it was read, it was done in the presence of defendant and his counsel, and no objection was made to it. Further, the record shows distinctly that the charge as to the assault *only* was submitted to and passed on by the jury.

The verdict is in accordance with law (Pen. Code, sec. 1151), and is free from uncertainty. (See *People* v. *McCarty,* 48 Cal. 559.) The same is true of the judgment. (See *In re Matter of Ring,* 28 Cal. 248.) The judgment as entered states the crime of which the defendant had been convicted, and the sentence of the court. This is all that is required by law. There is no uncertainty in these statements.

It is argued that there is a fatal variance between the information and the proof, inasmuch as the information sets forth that the assault was made on Daniel Anseon, and the proof is, that it was made on Daniel Auseon.

The court, in its charge, told the jury that the defendant is accused of the crime of an assault on Daniel Auseon. The only accusation in this case is that set forth in the information. The direction of the court to the jury is as to what is contained in the information. Whether the question as to what is contained in the

information is one of law or fact, it is to be determined by the court below, and when the court below has determined it, unless it clearly appears to be error, this court will not disturb it. Many persons, in writing the letter "u," sometimes form it very like the letter "n," and *e converso,* so that one letter is frequently mistaken for the other. We have no doubt such is the case here; that in giving shape to "u," it was formed in such a manner as to resemble the letter "n." The only evidence that we have that "n" was the letter, instead of "u," is that of the clerk who copies it to be printed in the records as "n." But the court below differed from the clerk as to this, and between the two, it is the duty of this court to follow the judgment of the court below. The foregoing considerations induce us to conclude that it is not clear that the court below fell into an error in this matter, but, on the contrary, that the court below read the information aright, and that in this regard there is no error in the record.

We have considered the points in regard to the directions given by the court below, and the refusal, by the court, of the requests to direct the jury, made by defendant, and find no error in them.

There is no presumption of law or fact that a person found anywhere on the passenger train of a railway is a passenger. Such a presumption is opposed to all principle. If a person is found in or on a passenger-car on a train for carrying passengers, such a fact will justify the conclusion *prima facie* that he is a passenger; but if seen to go on the platform of a mail-car, or of some other car not run for the accommodation or use of passengers, no such conclusion as that he was a passenger could be legitimately drawn. The rule seems to be laid down with a significant limitation in *Louisville etc. R'y Co.* v. *Thompson,* 9 N. E. Rep. 357, cited and relied on by defendant. The rule as there stated is, that "a person on a train used for carrying passengers is, in the absence of

countervailing circumstances, presumed to be a passenger, and rightfully there." By the language here used, *the presumption* is allowable, *"in the absence of countervailing circumstances,"* which is equivalent to saying that the presumption, admitting it to exist, belongs to the class of disputable presumptions, and may be rebutted. The rebutting evidence is spoken of, in the opinion, as countervailing circumstances, which are nothing more than rebutting circumstances. The circumstances which rebut the presumption that defendant was a passenger are abundant. Evidence was introduced which tended to show that the defendant was not a passenger on the train. A witness testified that he was a brakeman on the night passenger train No. 18 on the morning of the 20th of April, 1889, when the shooting occurred of which defendant is accused. On the morning of that day, before daylight, when it was dark, the train being stopped at Madera, in Fresno County, the witness saw two men (one of whom was defendant) coming up from the rear end of the depot to where he stood. These men crossed the platform of a sleeper, and went up on the opposite side of the train from the depot. They went up toward the engine. He saw them attempt to get on the train, behind the mail-car, between the mail-car and the express-car, and he halloed to them not to get on, to keep off, but they paid no attention to his hallooing. Witness went to where they were, the defendant standing on the platform of the mail-car, and the other on the platform of the express-car. He drove one off the train; the other (defendant) refused to go, and in the effort to get him off, the witness was shot by the defendant. The platforms of the cars on which the two men got were several cars distant from the regular passenger-car, and two cars from the nearest sleeper. These men did not go to the passenger-car at all, nor did they speak to any one connected with the management of the train, to procure a passage or pay fare, and when the witness (brakeman)

ordered them off the train, they did not say, or pretend in any way or manner, that they were passengers on the train. Evidence of these circumstances was before the jury. The court, in its instructions, left to the jury to find whether they were passengers or intruders or trespassers on the train. The objection on behalf of the defendant is, that there was no evidence on which this question could be left to the jury. In this, the learned counsel for defendant is mistaken. The evidence is detailed above, and in our view was sufficient, and the court committed no error in submitting the point to the jury whether the defendant was a trespasser or a passenger on the train.

Another point made is, that the court erred in telling the jury that the defendant, a trespasser on the train, was not justified in using his pistol and shooting, if the train was running at a rate of speed when he (the defendant) could with safety get off of it or descend from it. We cannot concur in this view. If wrongly on the train, no law would justify him in shooting, when he could with safety get off it and avoid the shooting. It was his duty to get off when told to do so. If he did not, he could not urge it as a defense rendering the shooting justifiable, if he could have gotten away from the train with safety to himself. This is too plain to require argument to establish it. The statement of the proposition is a refutation of it.

We are of opinion that the court fairly put the case to the jury in its directions, and refused no request which it was not proper in law to refuse.

The point as to the term of punishment is not well taken. By the provisions of subdivision 2, section 266, of the Penal Code, if the subsequent offense of which a person is convicted is such that upon a first conviction he could be punishable by imprisonment in the state prison for any term less than five years, then on such subsequent conviction he can be punished by imprison-

ment in the state prison not exceeding ten years. Here defendant, if he had been first convicted for the offense for which he was subsequently convicted, could have been punished by imprisonment in the state prison for two years; i. e., a term less than five years. For the subsequent conviction, then, he could have been sentenced to the state prison for a term *not exceeding ten years.* The sentence was for eight years, two years short of the time for which he could have been sentenced.

After an examination of all the points made and discussed, we are of opinion that there is no error disclosed by the record, and that the judgment and order should be and are affirmed.

McFarland, J., and Sharpstein, J., concurred.

Hearing in Bank denied.

[No. 13756. Department Two.—December 23, 1890.]

COUNTY OF SAN BERNARDINO, Appellant, *v.* THEODORE REICHERT, Surveyor-General, Respondent.

County Boundary—Statutory Construction—Reference to Mexican Grants — Survey — Patents.—The acts organizing the counties of San Bernardino and San Diego, and fixing the common boundary between them with reference to the lines of certain Mexican grants, must be construed as intending to adopt a line that could thus be definitely fixed; and an official survey of the grants which had been theretofore made and recorded is proper evidence of the location of the boundary, though not finally approved as the basis of patents confirming the grants, in preference to a subsequent survey, upon which the patents were based.

Id.—Mandamus to Surveyor-General—Question of Title—Intention of Legislature.—Even if the courts have jurisdiction to control the surveyor-general by *mandamus* in the matter of a survey of a county boundary, the proceeding does not involve any question of title to real property, or of the correct boundaries of land as between private claimants, although the act establishing the boundary may refer to private grants; but the sole question is as to the intention of the legislature in fixing the boundary at the time of adopting the line.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Harris & Gregg, Waters & Gird, and *H. O'Connor,* for Appellant.

J. L. Copeland, and *Brunson, Wilson & Lamme,* for Respondent.

THE COURT.—In July, 1887, the county of San Bernardino applied to the respondent, surveyor-general of the state, to survey the boundary line between said county and the county of San Diego. While the respondent was proceeding to perform that duty, the appellant filed a petition in the superior court, alleging, in substance, that he was proceeding to survey and run said boundary in a certain manner that was wrong, and upon a false theory, and praying for a writ of mandate compelling him to run the line in a certain other manner, which is alleged to be the right manner. The court rendered judgment against the appellant, who appeals from the judgment, and from an order denying a new trial.

The act organizing the county of San Bernardino was passed April 26, 1853. (Stats. 1853, p. 119.) By that act the northern boundary line of San Diego County (which had been previously organized) is made the southern boundary of San Bernardino County. (The boundaries of the two countries were afterwards substantially incorporated, in sections 3943 and 3944 of the Political Code.) The common boundary line between the two counties, as described in the acts organizing them, makes several express references to points on and lines of two certain ranchos, called San Jacinto Nuevo and San Jacinto Viejo. At the time of the passage of said act of April 26, 1853, these ranchos were known as Mexican grants; and one Hancock, a deputy United States surveyor, under direc-

tions of the proper authorities, had made and placed on record a survey of said ranchos. Afterwards, in 1880, a United States patent issued for the Viejo rancho; and in 1882, one Minto, a United States deputy surveyor, made a survey of the Nuevo rancho, upon which, in 1884, a United States patent issued for said last-named rancho. The Hancock survey does not appear to have been finally approved, and was not adopted as the basis for either of said patents. Appellant contends that the respondent, in running the line between the two counties, should have followed the lines of the ranchos as afterwards established by the Minto survey and the United States patents; while respondent contends that it was the intention of the legislature to determine what the boundary line was at and immediately after the passage of the act of 1853 organizing the county; that he should carry out that intention, and that in doing so, he may consider the Hancock survey as tending to show where the legislature at that time intended to fix the line. The court adopted the view of the respondent, and admitted in evidence the said Hancock survey; and we are not able to see that in so doing any error was committed.

This proceeding does not involve any question of title to real property, or of the correct boundaries of land, as between private claimants. In determining any such question with respect to said ranchos, of course, the lines of the patents would govern. But the legislature, when, in 1853, it passed the said act organizing said county, had power to fix the boundary line wherever it pleased, and for that purpose to adopt any description deemed proper to express its intention. It was the duty—and it certainly may be presumed to have been the intention—of the legislature to adopt a line that could be *then definitely fixed.* It cannot be presumed that the intention was to describe a line that could not properly be ascertained until the lapse of some indefinite period, when the United States government (over which there was no con

trol) should see fit, for other purposes, to issue patents for said ranchos; thus deliberately providing for the evils which must certainly come from an unknown and unknowable boundary between two municipal corporations. The Mitno survey and the patents were not in existence until from twenty-three to thirty years after the passage of the act organizing the county. It furthermore appears that parts of the description of the line as expressed in the act cannot be applied to the Minto survey, while they do correspond with the Hancock survey. Our conclusion is, that no error was committed by the court below.

We do not, however, wish to be understood as deciding that the courts have jurisdiction to control the surveyor-general in the matter here involved. Section 3872 of the Political Code provides that his action in such a case shall be "conclusive"; and in *People* v. *Boggs,* 56 Cal. 648, this court seems to have held that section not to be unconstitutional. But counsel for respondent do not make the point in their briefs or arguments, and we do not care to pass upon the question without fuller discussion.

Judgment and order affirmed.

[No. 12951. Department Two.—December 24, 1890.]

WILLIAM CAMPE, RESPONDENT, *v.* CHRISTIAN MEIERDIERCKS, APPELLANT.

APPEAL—REVIEW OF CONFLICTING EVIDENCE.—Where the evidence is conflicting, the decision of the court below on a question of fact will not be disturbed.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The action was brought to recover the sum of $3,630 for money loaned to the defendant. The defendant de-

nied the loan, and pleaded that all but fifteen hundred dollars of the money was given to the defendant freely and without solicitation, and that the remaining sum of fifteen hundred dollars was a present from the plaintiff to defendant's daughter, and that by the plaintiff's direction, he gave his note for that sum to his daughter. Further facts are stated in the opinion of the court.

W. B. Tyler, for Appellant.

Henry H. Reid, for Respondent.

THORNTON, J.—In this case the whole question is as to an issue of fact, which was determined by the court below in favor of plaintiff.

Whether the money sued for was a gift or not, part of it to the defendant, and a part of it to his daughter, depends on evidence in the cause. The evidence was on all material points conflicting. The court below decided that the money was not a gift, and rendered judgment for plaintiff.

It is no use to review the evidence, but as it was conflicting on the issue above mentioned, according to the long-established rule of this court, the decision of the court below will not be disturbed.

Judgment and order affirmed.

MCFARLAND, J., and SHARPSTEIN, J., concurred.

[No. 13724. Department One.—December 30, 1890.]

IN RE MATTER OF THE ESTATE OF L. M. McMANUS, AN INSOLVENT DEBTOR.

EXEMPTION FROM EXECUTION—REMEDIAL STATUTES—CONSTRUCTION.—Statutes exempting personal property from execution are remedial in character, and are to be liberally construed, as being intended to protect the debtor, and enable him to follow his vocation, so as to earn a support for himself and family.

ID.—IMPLEMENTS—TOOLS—CONSTRUCTION OF CODE.—The term "implements," as used in subdivision 4 of section 690 of the Code of Civil Procedure, which provides that "the tools or implements of a mechanic or artisan necessary to carry on his trade" shall be exempt from execution, has a broader signification than the term "tools," and includes any instrument needed and used for the purpose of carrying on his trade or business.

ID.—JEWELER'S SAFE—INSOLVENCY.—A jeweler's safe owned and used in the business of a jeweler and watch-repairer is exempt from execution, and should be set apart as such to him in proceedings in insolvency.

APPEAL from an order of the Superior Court of Ventura County setting apart to an insolvent debtor certain property as exempt from execution.

The facts are stated in the opinion.

George A. Rankin, and *Blackstock & Shepherd,* for Appellants.

Barnes & Selby, for Respondent.

BELCHER, C. C.—The respondent, L. M. McManus, was engaged in the business of a jeweler and watch-repairer, and while so engaged was adjudged to be an insolvent debtor. He owned and used in his business a jeweler's safe, which the court, against the objections of certain creditors, set apart to him as property exempt from execution.

The objecting creditors and the assignee of the estate appeal from the order, and contend that it was not authorized by law, and should therefore be reversed.

At the hearing, the respondent was called as a witness,

and "testified, in substance, that he was a jeweler and watch-repairer, and is engaged in that trade or business as a means of support for himself and family, and that without the use of said safe said business cannot be prosecuted by him to any profitable end; that it is a necessary and useful article in conducting said business; that without the use of said safe his customers would not leave their jewelry and watches with him to be repaired." Another witness was also called, and testified: "That he is a practical watch-maker and jeweler; that a safe similar to the one mentioned is an article without which the business of jeweler and watch-maker and watch-repairer cannot be prosecuted to any profitable end, and that such a safe is a necessary and useful article in carrying on the business of a jeweler and watch-repairer; that without the use of such a safe very few customers will leave their jewelry or watches with the artisan to be repaired."

This was all the testimony offered, and upon it the court made its findings and order as follows: "That the said safe is an article without the aid of which the business of petitioner as jeweler and watch-maker cannot be prosecuted to any profitable end, and that said safe is necessary to and in actual use by the petitioner in prosecuting his said business. Wherefore it is hereby ordered that the said safe be set apart, and that the same is hereby set apart, for the use of said insolvent debtor, and that the same shall not be subject to be applied to the payment of his debts."

Section 60 of the Insolvent Act makes it the duty of the court having jurisdiction of insolvency proceedings to exempt and set apart for the use and benefit of the insolvent such real and personal property as is by law exempt from execution. And section 690, subdivision 4, of the Code of Civil Procedure provides that "the tools or implements of a mechanic or artisan necessary to carry on his trade" shall be exempt from execution.

Statutes exempting personal property from forced sale are remedial in character, and are evidently intended to protect the debtor, and enable him to follow his vocation, and thus earn a support for himself and family. The general rule now is, that such statutes are to be liberally construed, so as to effectuate the humane purpose designed by the law-makers, and our Code of Civil Procedure declares that all of its provisions are to be so construed, "with a view to effect its objects, and to promote justice." (Sec. 4.)

It is difficult to define accurately the word "implements," and the courts, so far as we are advised, have never attempted to define it. Webster gives as the meaning of the word, "Whatever may supply a want; especially an instrument or utensil as supplying a requisite to an end; as the implements of trade, of husbandry, or of war"; and "utensil" he defines as "that which is used; an instrument; an implement; especially an instrument or vessel used in a kitchen, or in domestic and farming business." By the courts, these words are accorded a broad signification, and under them many things have been exempted which are not tools.

Thus in the state of Kansas, under a statute exempting "the necessary tools and instruments of any mechanic, miner, or other person used and kept for the purpose of carrying on his trade or business," it has been held that an insurance agent and abstractor of titles could claim as exempt an iron safe and set of abstracts which were used and kept by him for the purpose of carrying on his business. (*Davidson* v. *Sechrist,* 28 Kan. 324.) And the same rule has been applied to a printing-press, type, and other articles used in publishing a newspaper. (*Bliss* v. *Vedder,* 34 Kan. 59; 55 Am. Rep. 237.)

In Illinois, it has been held that a piano used by a music-teacher, and upon which she relied for support, was within the law exempting "furniture, tools, or im-

plements necessary to carry on his or her trade or business." (*Amend* v. *Murphy,* 69 Ill. 337.)

In Massachusetts, a clock, stove, screen, pitcher, and table-cover used and necessary to carry on the business of a milliner have been held to be included in "tools, implements, and fixtures." (*Wood* v. *Keyes,* 14 Allen, 236.) So, also, a sewing-machine. (*Rayner* v. *Whicher,* 6 Allen, 294.)

In Vermont, a barber's chair has been held exempt as a tool. (*Allen* v. *Thompson,* 45 Vt. 472.)

In this state it has been held that an expensive thrashing outfit was not exempt under the statute exempting "the farming utensils or implements of husbandry of the judgment debtor"; but this was upon the ground that the outfit was principally used in thrashing grain raised by other persons for hire. (*In re Baldwin,* 71 Cal. 74.)

Other cases bearing upon the question might be cited; but we think it sufficient to refer to Freeman on Executions, 2d ed., sections 226, 226 a, and to 7 American and English Encyclopædia of Law, page 135, in both of which works the authorities are very fully collated and reviewed.

In view of the testimony submitted in this case, and the authorities above cited, we see no error in the ruling of the court below, and we therefore advise that the order appealed from be affirmed.

Hayne, C., and Vanclief, C., concurred.

The Court.—For the reasons given in the foregoing opinion, the order appealed from is affirmed.

[No. 13782. Department One.—December 30, 1890.]

J. H. CONKLING, RESPONDENT, v. THE PACIFIC IMPROVEMENT COMPANY, APPELLANT.

RIPARIAN RIGHTS—DIVERSION OF STREAM—RIPARIAN OWNERSHIP—PRE-EMPTION CLAIM — RECEIVER'S RECEIPT — PLEADING — EVIDENCE.—In an action by one riparian owner to enjoin another from diverting water from the stream, where the plaintiff claims the possession of his tract of land as a pre-emptor from the government, for which he holds a receiver's receipt, it is not necessary to allege in his complaint facts showing that the lands were subject to pre-emption, and that he was a qualified pre-emptor, and took the steps necessary to acquire title from the government; but it is sufficient to allege and prove the receiver's receipt, which is *prima facie* evidence that he is rightfully in possession of the tract described therein, and entitled as a riparian owner to protect himself against an unlawful diversion of the waters of the stream.

ID.—ABANDONMENT OF PRE-EMPTION CLAIM—GRANT OF WATER RIGHT—SUBSEQUENT PRE-EMPTION.—An abandonment of a pre-emption claim defeats the right of a person claiming under the pre-emptor as grantee of a right to divert the waters of a stream flowing through the land pre-empted as against a subsequent pre-emptor.

ID.—ABANDONMENT UPON PURCHASE—PRE-EMPTION BY PURCHASER—FRAUD UPON GRANTEE OF WATER RIGHT.—The fact that a subsequent pre-emptor has purchased the claim of a prior pre-emptor, and that the abandonment of the pre-emption claim was induced by the purchase, does not render the subsequent pre-emption entry of the purchaser fraudulent or illegal; nor can the grantee of a water right claiming under the first pre-emptor be considered as defrauded by the subsequent pre-emption of the land by the purchaser from his grantor.

ID.—LIMITED RIGHT OF DIVERSION—APPROPRIATION.—Where the defendant has acquired by appropriation a limited right of diversion, and has lost further claim to appropriation by failure to complete the whole diversion called for by his notice of appropriation within a reasonable time, he cannot increase the amount of his diversion thereafter to correspond with his notice of appropriation, to the prejudice of the rights of a riparian owner.

ID.—INJUNCTION—DIVERSION BY WATER-PIPE—COMPLETION OF PIPE—CONTINUED DIVERSION.—The fact that the unlawful diversion of water had actually taken place before the commencement of a suit to enjoin the diversion, and that a water-pipe of improper size, by which the water was diverted, was completed before the filing of an amended complaint seeking to enjoin the diversion of water thereby, constitutes no objection to an injunction to prevent the continued diversion of the water.

ID.—DAMAGES.—If it appears that the diversion of water from a riparian owner is wrongful, it is not necessary for the plaintiff to prove damages, to entitle him to an injunction.

Id.—Enjoining Excessive Diversion.—Where the right of the defendant to divert a certain quantity of water by means of a pipe of a certain size is conceded and established, and it appears that defendant has constructed another and larger pipe, which is capable of diverting more water than he is entitled to divert, he cannot be injured by an injunction against the excessive diversion, regardless of whether the smaller pipe would or would not divert all the waters of the stream.

Appeal from a judgment of the Superior Court of Santa Barbara County, and from an order granting an injunction.

The facts are stated in the opinion of the court.

A. B. Hotchkiss, for Appellant.

W. C. Stratton, for Respondent.

Works, J.—This action was brought by the respondent against the appellant to enjoin the latter from diverting water from a certain natural stream in the county of Santa Barbara. The defendant owned two tracts of land on the stream. Between these two tracts the plaintiff was in possession of a tract of land, claiming the same as a pre-emptor from the government, and for which he held a receiver's receipt.

The court below found for the plaintiff, and enjoined the defendant from diverting and using the water, as prayed for in the complaint. No motion for a new trial was made, but the bill of exceptions was filed within sixty days, and specifications are made and errors of law assigned therein.

Counsel for appellant makes numerous points in his brief, which we will attempt to notice in their order.

The first point made is, that the court below erred in overruling the defendant's demurrer to the amended complaint. The objection made to the complaint is, that it does not show that the plaintiff was, at the time the action was brought, or at the time the water was diverted from the stream, the owner of the land, or that the land

was subject to pre-emption, or that he was a qualified pre-emptor. The allegations of the complaint, so far as it affects this question, are as follows: "That the plaintiff is, and was on the first day of October, 1888, the owner of that certain tract of land situate in the county of Santa Barbara, state of California, to wit, ... and he now is, and has been since the month of May, 1887, in the actual possession and occupancy of said land; that in the month of May, 1887, said land was public land of the United States open to settlement, and plaintiff, who was twenty-one years old, and a citizen of the United States, did in said month settle upon said land with the intention of pre-empting the same and acquiring title thereto, and on the nineteenth day of May, 1887, he filed his declaratory statement in the United States land-office of the district in which said land is situated, claiming said land under the pre-emption laws, and on the fourteenth day of September, 1888, he paid for said land, and received from the receiver of the said land-office his receipt for said payment."

These averments are not sufficient to show a compliance with the law relating to pre-emption settlements upon and purchase of government lands. (Rv. Stats. secs. 2259, 2264; *Quinn* v. *Kenyon,* 38 Cal. 501; *Page* v. *Hobbs,* 27 Cal. 486.)

But it is contended by the respondent that no allegation of facts necessary to show that the lands were subject to pre-emption, or that the respondent was a qualified pre-emptor, and took the steps necessary to acquire the title from the government, is necessary in a case of this kind; that it was enough to allege that he was the holder of the receiver's receipt and in possession thereunder. In this contention we must hold with the respondent. This is not a case involving title to the land in which each of the parties is claiming through the government. The appellant makes no claim of title to the land, nor is it shown to be in privity with the para-

mount source of title, or in the position, for any reason, to question the legality of the respondent's holding, except by an affirmative showing against the *prima facie* case made by the receipt. In such a case it is sufficient for the occupant of the land to allege and prove the receiver's receipt, which is *prima facie* evidence, in a case of this kind, that he is rightfully in possession. (Code Cv. Proc., sec. 1925; *Figg* v. *Handley,* 52 Cal. 244; *Conlan* v. *Quinby,* 51 Cal. 413.) And being so in possession as a pre-emptor, and having complied with the requirements of the statute, which is shown, as we have said, by the receiver's receipt, he had become a riparian owner upon the stream, and as such entitled to protect himslf against any unlawful diversion of the waters therefrom. (Pomeroy's Riparian Rights, secs. 35, 36.) There are other objections urged to the complaint, but none of them are well taken. The demurrer to the amended complaint was properly overruled.

A demurrer was sustained to the second defense set up in the defendant's answer, and this is claimed to have been an error. It is alleged, in this defense, that one Bush entered upon the lands claimed by the plaintiff in this action, as a pre-emptor, and filed his declaratory statement in the land-office, and that while so in possession of the land, said Bush granted to one Underhill the right to construct and maintain a pipe line over said lands, together with the right to use and divert the waters flowing in said creek; that Underhill conveyed this right to the defendant; that defendant had entered into the occupation of said lands for its said business of water supply; had laid its pipes, at great cost and expense, in such manner as that plaintiff must have had notice of the fact; that plaintiff made his so-called settlement with full notice of defendant's claims, rights, appropriations, and expenditures; that Bush relinquished to the United States his claim as a pre-emptor by filing the declaration to that effect, and the lands thereby reverted to the United States,

subject to the defendant's occupation for the purposes aforesaid, and were not thereafter subject to any further rights of pre-emption. It is further alleged that the plaintiff entered upon the lands, not in good faith, as a pre-emptor, but for the purpose of obtaining a technical advantage of defendant, and thereby compelling it to buy his claim, and secretly, and without notice to the defendant, procured the officers of the land department to issue to him a receipt for payment for said lands; that no patent had issued to the plaintiff, and the defendant had protested against the issuance of any such patent, and that the expenditures made by the plaintiff in improving the land were made in bad faith. We are unable to see anything in this pleading which can amount to a defense to the plaintiff's cause of action. It is earnestly contended by the counsel for appellant that the plaintiff obtained no rights in the water flowing through the land by entering upon the land, making payment therefor, and procuring the receiver's receipt, and yet, in support of this answer, he contends that Bush obtained such a right by merely entering upon the land and filing his declaratory statement, without making payment or receiving a receipt; that by his deed his right passed to Underhill, and from Underhill to the defendant; and that the abandonment of his right of pre-emption by Bush not only did not defeat the defendant's right to divert the water obtained through him, but actually confirmed it, and shut off all other persons from entering upon and acquiring title to the land. The statement of such a proposition is sufficient to refute it. Bush had no right in the water to convey. But if he had, it was lost by his subsequent abandonment of his claim, and the right, in the hands of the defendant, was no better than if it had remained in Bush. The allegations tending to show that the entry of the plaintiff was made to defraud and take advantage of the defendant add nothing to the pleading. The defendant had no

rights in the land, or the water as appurtenant to the land, and could not therefore be defrauded by the plaintiff's entry. There was no error in sustaining the demurrer to this defense.

There was no error in refusing to strike out the amended complaint on the defendant's motion.

The appellant contends that the court below erred in certain rulings upon the evidence. The ground of this contention seems to be that the entry of the respondent upon the land as a pre-emptioner was fraudulent and invalid, because it appeared that he had bought the claim of Bush to pre-empt the land, and Bush had abandoned his claim, and the plaintiff had thereupon entered thereon. But the answer to this is, that the plaintiff is not claiming under the entry of Bush, but under his own entry, after that of Bush had been abandoned. The fact that Bush had been induced to abandon his claim by the payment of money did not prevent the plaintiff from entering upon and acquiring title to the land. Bush having abandoned his claim in the manner provided by law, the land was open to entry by the plaintiff or any one else, and the entry was not fraudulent or illegal because of Bush's prior entry and abandonment of his claim.

The same contention is made the ground of objection to the introduction of the receiver's receipt, and for the same reasons the objection was properly overruled.

It is insisted by the appellant that the findings of the court do not support the judgment, and are not sustained by the evidence. Both of the parties to this action were riparian owners on the stream the waters of which are in controversy, and each also claimed to be prior appropriators of such waters, or a part of them. The court below found that the plaintiff was the owner of the land claimed by him; that the same was public land; that he settled upon the same as pre-emptor, filed his declaratory statement as such, made proof and payment on

September 14, 1886, obtained a receiver's duplicate receipt, has ever since occupied and cultivated the lands, and made improvements thereon to the value of fifteen thousand dollars; that the land lies on both sides of the natural stream known as the Loma Abaja Creek, and at the time the plaintiff obtained his receipt the defendant had appropriated and was diverting a portion of the waters of said creek by means of a one and one half inch pipe, which was not of sufficient capacity to divert all of the waters of the creek, and a part thereof ran down to plaintiff's land; that when plaintiff settled upon the land he commenced to use the waters of the creek for domestic and other purposes, and on the fifth day of August, 1867, he appropriated a portion of the waters of the creek and diverted the same by means of a two and one half inch pipe, and used the same for irrigation and other purposes, and has so used the same continuously since that time; and the defendant intends to divert all of the waters of said creek from its natural channel by means of a six-inch pipe at a point thereon above plaintiff's land to a point below the same, and deprive the plaintiff of the use thereof, and that such diversion would render plaintiff's land, and the improvements thereon, of little or no value, and will be of great and irreparable damage to him, and that neither the defendant nor its grantors or predecessors have ever occupied any part of the lands claimed by the plaintiff for any purpose.

As to the defendant's right to divert and use the water of the stream, the court found as follows:—

"That on the thirteenth day of August, 1887, A. S. Cooper posted a written notice at a point on said creek above plaintiff's land, claiming the water flowing in said creek to the extent of fifteen inches, measured under a four-inch pressure, which notice was within ten days duly recorded in the office of the recorder of the county of Santa Barbara; that after the posting and recording of said notice, said Cooper conveyed all of his rights and

interests in the waters of said creek to defendant. But said Cooper did not actually divert or use said water for any purpose, and his appropriation was made for the purpose of speculation only, and he did not within sixty days after the posting of his notice commence the excavation or construction of any works in which he intended to divert the water; the defendant, after Cooper's sale to it, which was more than sixty days after he posted his notice, did commence the excavation and construction of works in which he intended to divert the water; that the plaintiff did not post any notice of his intention to appropriate any of the waters of said creek, but he had actually appropriated and diverted the water as set forth in the third finding, and was using it for domestic purposes and irrigation at and before the time when said Cooper posted his appropriation notice.

"That on the thirteenth day of March, 1885, Alexander B. Todd posted a written notice at a point on said creek above plaintiff's land, claiming the water flowing in said creek to the extent of twelve inches measured under a four-inch pressure, which notice was duly recorded; and he stated in said notice that he intended to divert said water by means of one ten and one half inch iron pipe, and a one and one half inch iron pipe, and said Todd did divert water from said creek through a one and one half inch iron pipe, which pipe is the one mentioned in the second finding; that the defendant is the successor in interest of said Todd, but no actual appropriation or diversion of any water has been made under the said Todd notice except as to the said one and one half inch pipe, and no steps have been taken to divert any water under said notice, other than as to said pipe, and neither said Todd nor his successors in interest began or prosecuted with diligence the excavation or construction of the works in which it was intended to divert any water from said creek under said notice, except as to said one and one half inch pipe; and the plaintiff had actually

appropriated, diverted, and used the waters of the Loma Abaja Creek, as set forth in the third finding, before the defendant, or its grantors or predecessors in interest, had commenced the excavation or construction of any works in which it was intended to divert any water from said creek, other than through said one and one half inch pipe.

"That the defendant is the owner of sections 5 and 6, township 4 north, range 27 west, San Bernardino meridian, but the said land is below the land of plaintiff's land, and said Loma Abaja Creek flows through plaintiff's land before reaching the said land of defendant."

As a conclusion of law from these findings the court found: "That the plaintiff is entitled to have the said creek flow in its natural channel down to his said land, less the portion thereof diverted by means of a one and one half inch iron pipe, and that he is entitled to the relief prayed for in his complaint, and it is ordered that judgment be entered accordingly."

The court thereupon entered judgment enjoining the defendant from diverting any of the waters of the stream except that which might be diverted by means of the one and one half inch pipe.

These findings were clearly sufficient to sustain the judgment, and after a careful examination of the record, we are satisfied that the findings are supported by the evidence.

It is earnestly contended by the counsel for the appellant that the evidence fails to show that at the time the *amended* complaint was filed the defendant was threatening to divert the waters of the stream, but that, on the contrary, the diversion by the six-inch pipe was complete, and for that reason injunction could not properly issue. But conceding that the six-inch pipe had been put in and the diversion of the water had taken place at the time that the amended complaint was filed, or at the time the action was commenced, which was the ma-

terial question, and conceding that the diversion had actually taken place, the act of carrying the water away from its natural channel, if wrongful, was a continuous act, against which an injunction might issue. (*Moore* v. *Clear Lake Water Works,* 68 Cal. 146.) The continued diversion of the water was the material thing to be enjoined, and not the putting in of the pipe.

It is further insisted that the evidence fails to show that the plaintiff had been or would be damaged by the diversion of the water. We think otherwise; but if it appeared that the diversion was wrongful, it was not necessary for the plaintiff to prove damages, to entitle him to an injunction. (*Moore* v. *Clear Lake Water Works,* 68 Cal. 150.)

Again, it is claimed that the plaintiff conceded the defendant's prior right to divert the waters of the stream to the capacity of its one and one half inch pipe, but averred that such pipe was not sufficient to divert all of the waters of the stream; that this averment was denied and was not supported by the evidence. We think the evidence does show that the one and one half inch pipe would not carry all of the waters of the stream. If it would, it was at least a little remarkable that the defendant should go to the expense of putting in another and much larger pipe to divert water that was not there; and besides, the claim is hardly consistent with the contention, above noticed, that the defendant was at the time the amended complaint was filed actually carrying off water with this six-inch pipe. But this, it seems to us, is not very material. The defendant was not enjoined from diverting the water to the full capacity of the one and one half inch pipe. If this left no other water to divert, the defendant was not injured by the injunction, and has no reason to complain, except it might be as to the costs.

It is contended further that the laches and acquiescence of the plaintiff in allowing the defendant to pro-

ceed with its improvements was sufficient to defeat his right to an injunction. But we see nothing in the evidence to support this position.

It is further insisted that the rights of the appellant could not be *forfeited* by a proceeding of this kind. But this is not an attempt to forfeit any right the appellant had, but to show that it never had any rights.

There are other objections to the findings, that need not be particularly noticed.

There is no error in the record.

Judgment affirmed.

DEHAVEN, J., and PATERSON, J., concurred.

Hearing in Bank denied.

[No. 13251. Department Two.—December 30, 1890.]

JENNIE BOWMAN, APPELLANT, *v.* S. T. MOORE ET AL., EXECUTORS, ETC., RESPONDENTS.

MUTUAL BENEFIT ASSOCIATION — INSURANCE OF LIFE — CHANGE OF BENEFICIARY.—Where a certificate of membership in a mutual benefit association, purporting to be an insurance on the holder's life, payable after his death to his wife as beneficiary, provides that the member may, in writing filed with the association, substitute some other beneficiary, the sending of a letter to and filing it with the association by the holder of the certificate, requesting that the beneficiary be changed to the executors named in his will, and an indorsement upon the certificate, signed by the secretary, changing and substituting the beneficiary, is a substitution in writing of another beneficiary, in accordance with the provisions of the certificate.

Id.—CHANGE IN WRITING—ACT OF SECRETARY—AGENCY.—It is not necessary, to effect a change of the beneficiary, that the change should be wholly in the handwriting of the member; but it may be done through the agency and handwriting of the secretary, provided it was done by the authority of the member, and for him.

Id.—SUBSTITUTION OF EXECUTORS AS BENEFICIARIES—WILL—DEVISE.—The substitution of the executors of the member as his beneficiaries, and the insertion in his will of a direction to them to apply the proceeds in payment of his debts, is not an attempt to devise by will the policy or its proceeds.

APPEAL from a judgment of the Superior Court of Santa Clara County.

The facts are stated in the opinion of the court.

D. W. Herrington, for Appellant.

The provisions made in certificate No. 893 for "Jennie Bowman, wife," is a trust. (Bacon on Benefit Societies, sec. 292; Perry on Trusts, 2d ed., sec. 687.) The trust could not be revoked or defeated in the mode adopted by the trustor. The power reserved in the declaration of trust was not strictly pursued, as by law is required. (Civ. Code, sec. 2280; Bacon on Benefit Societies, sec. 291; *Duvall* v. *Goodson,* 79 Ky. 228; *Washington Endowment Ass'n* v. *Wood,* 4 Mackey, 10; 1 Perry on Trusts, 2d ed., secs. 259, 260, p. 328.) The power reserved gave no authority to delegate the nomination to another than the member, though both instruments had been filed. (*Wendt* v. *Iowa Legion of Honor,* 72 Iowa, 682.) The mode provided in the declaration of trust to change the beneficiary named in the certificate is the measure of the power to effect the change. (Civ. Code, sec. 2880; *Wendt* v. *Iowa Legion of Honor,* 72 Iowa, 682; *Knights of Honor* v. *Nairn,* 60 Mich. 44; Bacon on Benefit Societies, sec. 241; *Worley* v. *N. W. Mas. Aid Ass'n,* 10 Fed. Rep. 227; *Stephenson* v. *Stephenson,* 64 Iowa, 534; *Coleman* v. *Knights of Honor,* 18 Mo. App. 189; *Olmstead* v. *Masonic Mutual Benefit Soc.,* 37 Kan. 93.) The power reserved to make the change was in the nature of a personal trust, and could not be delegated to another to make it for him. (Bacon on Benefit Societies, sec. 237, p. 337; *Bloomer* v. *Waldron,* 3 Hill, 365; 1 Perry on Trusts, secs. 287, 408.) To constitute a valid execution of the power of substitution (or revocation) reserved, the acts for the purpose must have been of the species required by the certificate 893. (*Bloomer* v. *Waldron,* 3 Hill, 365; 15 N. Y. Com. L. Rep. 618;

Bacon on Benefit Societies, sec. 239, p. 341; *Daniels* v. *Pratt,* 143 Mass. 216; *Huslen* v. *Kean,* N. C. Term. Rep. 279; 7 Am. Dec. 720.)

J. H. Campbell, for Respondents.

Policies payable to the wife or legal representatives of the assured, or to the assured, his executors or administrators, are within the control of the assured, and with the consent of the insurer the policy may be surrendered, and a new one taken out payable to another person. (*Johnson* v. *Van Epps,* 13 Ins. L. J. 887.) A policy made payable to the "legal representatives" of the insured is assets of the estate subject to the payment of debts. (*People* v. *Phelps,* 78 Ill. 147.) It is needless to consider whether the defendants hold this money as trustees, and the term "executors" is merely descriptive, or hold it as the executors of the will of Joseph Bowman. If the substitution was effective, they are entitled to hold the money as against the claim of the plaintiff. (See *In re Griest's Estate,* 76 Cal. 497; *Knights of Honor* v. *Watson,* 64 N. H. 517.)

THORNTON, J.—Joseph Bowman became on the thirteenth day of June, 1885, a member of the California Life and Accident Association, a corporation and mutual benefit association, and there was issued to him a certificate of membership therein numbered 893. This certificate purported to be an insurance on his life for five thousand dollars, payable after his death to the plaintiff, Jennie Bowman, his wife, "unless," as provided in the certificate, "said member shall in writing filed with this association substitute some other beneficiary, in which case said amount shall be paid to said substituted beneficiary."

On June 4, 1886, Joseph Bowman executed his last will, naming therein the defendants as executors thereof. In this will he inserted the following provision: "Thirdly,

I direct that my executors hereinafter named shall, as soon after my death as possible, collect the amount due on a certain policy issued by the California Life and Accident Association, said policy numbered 893, made payable to Jennie Bowman, bearing date June 13 (thirteenth), 1885, said policy to be transferred for the purposes hereinafter expressed, viz., in full payment of all my debts owing at the time of my death, or in part payment of the same if my debts exceed the amount of said policy, to wit, five thousand dollars."

After the execution of his will, Joseph Bowman filed with the secretary of the association this writing:—

"GILROY, June 4, 1886.

"Secretary Cal. Life and Acc't Ass'n, San Francisco.

"*Dear Sir,*—Inclosed herewith, I hand you my certificate of insurance in your company. Please do favor to change the beneficiary from the name now embraced in the said certificate to the executors named in my will, which bears even date herewith, viz., June 4, 1886, and for the purposes therein expressed. Thus oblige,

"JOSEPH BOWMAN.

"Return policy to George T. Dunlap, Gilroy, Cal."

Indorsed on this direction on file in said secretary's office are the following words and figures: "Change made June 9, 1886," and upon the certificate of membership, partly in print and partly in writing, is endorsed the following:—

"The beneficiary under this certificate of membership, pursuant to the rules of this association, is hereby changed from Jennie Bowman, wife of the person named in the within certificate, to the executors named in his will, which bears date of June 4, 1886, or their legal representatives, said change being made at the written request of Joseph Bowman, dated Gilroy, June 4, 1886.

"W. H. PETTIS, Secretary.

"San Francisco, June 9, 1886."

Joseph Bowman died at the county of Santa Clara on the 29th of August, 1886, leaving the plaintiff his widow.

After Bowman's death, his will was duly admitted to probate, and the defendants, S. T. Moore and Theodore Bowman, were regularly appointed and qualified as executors thereof, on the 9th of October, 1886, and they have since administered on the estate of their testator.

In due time the money due on the certificate, to the amount of two thousand dollars, was paid by the association on the joint receipt of the plaintiff and defendants, the defendants signing the receipt as executors. The joint receipt was demanded by the association before it would pay. This money passed into the hands of defendants, who claimed the same as the substituted beneficiary in virtue of the written direction of a change of beneficiary made by their testator, Joseph Bowman. This payment was indorsed on the certificate No. 893.

Subsequently the plaintiff notified in writing the executors of Joseph Bowman that she would not accept the terms of the will of her deceased husband, and demanded of them the payment to her of the two thousand dollars above mentioned, claiming to be the beneficiary of the policy on which the money was paid to them. This demand was refused, and plaintiff brought this action against the defendants to recover the money paid them. The court rendered judgment in favor of defendants. Plaintiff prosecutes this appeal.

The above are the facts found by the court below, on which this appeal is to be determined.

The contention is here made on behalf of plaintiff that the judgment is not sustained by the findings of fact, and that judgment should be entered in her favor.

It is argued that the provision made in certificate No. 893 for "Jennie Bowman, wife," is a trust, subject to be defeated under the power reserved in these words: "Unless said member (Joseph Bowman) shall *in writing filed* with said association substitute some other beneficiary,

in which case said amount shall be paid to said substituted beneficiary."

Let it be conceded that by the provisions contained in the certificate or policy a trust was created for the benefit of the wife, still, the trust, as is conceded, can be defeated by substituting another beneficiary. Jennie Bowman's right was contingent. If the change was regularly done, the right of the first-named beneficiary is at an end. Was the substitution here made in accordance with the provisions of the certificate? That is the question to be determined.

Joseph Bowman was authorized, by the terms of the certificate, as above stated, to substitute another beneficary by writing filed with the association. This, in our judgment, he did do. The writing to that effect was communicated to and filed with the association. The intention to substitute is so clear on the face of the paper that we see no room for construction. That must be considered as done which it was the intention of the assured to do. The form in which the substitution is made is immaterial. It would be a strained construction to hold that the assured did not intend to substitute another beneficiary instead of the one first named. The request to the secretary was to make the substitution desired by the assured appear on the books of the association. Nor was the consent of the wife (plaintiff in this action) necessary to the making of the substitution. It was a part of the contract, as entered into in the beginning, that the assured, of his own free, unrestrained will, might at any time make the substitution he desired. The wife, though named as beneficiary, could not in any way control the will of the assured. Whatever rights she had under the certificate, she could not in any way restrain or control her husband, the assured, in making the subsequent substitution.

Nor do we see any reason why the assured could not

name his executors as beneficiaries. This is not an attempt to devise by will the policy or the proceeds. This, it may be conceded, he could not do. But designating in the requisite made his executors as beneficiaries was within his power. The beneficiary is but the recipient of the policy or its proceeds; and why the assured could not make his executors or administrators, or his children or his daughters, beneficiaries, without naming them, we cannot perceive. No one is injured by it. There is no rule or policy of law forbidding it. It is not contrary to good morals. The association is not called on to pay until after the death of the assured. Then the persons named as executors would become known. At any rate, the association could not be called on to pay the amount due on the policy until the executors made themselves known to it.

Further, we do not see why the assured could not make the secretary of the association the medium through which the writing might be made changing and substituting the beneficiary. All that was done was done in the lifetime of the member. The change was to be made in writing, and filed with the association. It was not requisite that the writing should be actually made by the assured member in his own proper handwriting. It could be made in the handwriting of another, provided it was done by his authority, and for him. This was done through the agency of the secretary. We see no reason why this is not a compliance with the member's contract made in the beginning with the association. In substance and in fact the change was made in writing, and filed as required.

The views above expressed are in accordance with sound legal principles. The contentions on behalf of plaintiff are not so sustained. To uphold them would be to put form above substance, and unsubstantial technichalities above substantial legal rules.

We find no error in the record.
Judgment affirmed.

SHARPSTEIN, J., and MCFARLAND, J., concurred.

Hearing in Bank denied.

[No. 13314. In Bank.—December 31, 1890.]

GEORGE D. FISKE ET AL., RESPONDENTS, *v.* WILLIAM H. SOULE, APPELLANT.

COMMISSIONS OF REAL ESTATE AGENTS—REPUDIATION OF CONTRACT BY VENDOR.—Real estate agents may recover from their principal the commissions agreed upon for a sale secured by them, if the proposed contract of sale was not beyond their authority, though the vendor refuses absolutely to consummate the purchase or to negotiate with reference to it.

ID.—SALE WITHIN AUTHORITY—ALTERNATIVE CONTRACT—CROPS.—Where the contract by the proposed vendor with the real estate agents authorizes them to sell at a certain price per acre without crops, or at a certain larger price per acre with crops, a contract of sale for a gross sum which yields per acre more than the highest amount required is not beyond the authority conferred, though it does not specify whether the sale is with or without crops.

ID.—CONSTRUCTION OF CONTRACT—ORAL ASSESSMENT—MISTAKE.—A written contract for the sale of land for a gross sum, which does not except the growing crops, binds the vendor to convey the land with the crops.

ID.—TENDER—DEMAND OF DEED—WAIVER OF OBJECTION.—The fact that an ordinary grant deed without reservation of the crops was presented by the purchaser for execution by the vendor when the purchase-money was tendered, and that both contract and deed were not in proper form to express the real agreement understood between all the parties, to the effect that the sale was not to include the crops, cannot be offered by the vendor as an excuse for totally repudiating the contract, or by way of defense to an action by the real estate agents to recover the amount of commissions agreed upon in case of a sale without crops, it appearing that the contract and deed were not objected to on that ground, or considered as including the crops.

ID.—BROKER'S COMMISSION—PROCURING PURCHASER.—It is immaterial whether the power conferred upon real estate agents is to sell or merely to secure a purchaser, so far as their right to recover the agreed commission is concerned, if they comply with their part of the contract in procuring a purchaser, to whom the vendor refuses to convey.

ID.—PLEADING — CONTRACT IN HÆC VERBA.—Where the contract with the real estate agents is set out *in hæc verba*, and made part of their complaint, it entitles them to recover whatever is authorized by its terms and by the facts proved, and it is immaterial that the complaint construes and treats it as a power to sell, conceding that it is not such, and that the agents are only entitled to recover as mere brokers.

ID.—AUTHORITY OF AGENT—CONTRACT AGAINST ENCUMBRANCES—WARRANTY—DEED OF GRANT.—A contract by the real estate agent that the vendor shall convey the land free of all encumbrances does not require him to convey by general warranty against all encumbrances, and if the deed demanded by the purchaser is an ordinary grant deed, the form of which is not objected to by the vendor, and it does not appear that any encumbrances existed, it cannot be objected to the recovery of commissions that a contract to convey by general warranty was not within the power conferred.

ID.—MUTUALITY OF CONTRACT—TENDER.—It is no defense to recovery of the agreed commission that the contract was not mutual, and that the purchaser might have forfeited the cash payment, if the whole purchase-money was tendered to the vendor and a deed demanded before the commission was demanded.

ID.—TERMS OF PAYMENT.—A contract between a vendor and a real estate agent providing that the terms of payment are to be as buyer and seller may agree does not impose upon the agents the duty of selling for cash, even if it be construed as reserving to the vendor the right to agree upon the terms in person; and there can be no reasonable objection to the terms of payment as a defense to the recovery of commissions, if when cash was tendered by the purchaser no objection was made on account of the terms.

ID.—PAYMENT OF PURCHASE-MONEY—REFUSAL TO ACCEPT TENDER.—When the vendor has refused to accept the tender of the purchase-money, and repudiated the contract made by his real estate agents with the purchaser, he cannot defend against the payment of commissions on the ground that the purchase-money was not paid.

ID.—WANT OF TITLE IN VENDOR.—Where a vendor gives to real estate agents the property of his wife to sell as his property, and so describes it in the contract, and they procure a purchaser without knowledge that the title was not in the vendor, his want of title cannot affect their right to recover their commissions from him.

APPEAL from a judgment of the Superior Court of Yolo County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Thomas & Hurst, for Appellant.

The contract did not authorize plaintiffs to sell, but merely to find a purchaser. (*Treat* v. *De Celis*, 41 Cal.

202; *Duffy* v. *Hobson,* 40 Cal. 240; 6 Am. Rep. 617; *Rutenberg* v. *Main,* 47 Cal. 213; *Ripon* v. *Magee,* 1 Am. Law Mag. 351; *Vanhorn* v. *Frick,* 6 Serg. & R. 90; *Vinton* v. *Baldwin,* 88 Ind. 104; 45 Am. Rep. 447; *Reyman* v. *Mosher,* 71 Ind. 596.) The instrument in writing here presented by plaintiffs is a mere broker's contract, and does not authorize them to sell, or to receive the purchase-money, or to bind the defendant to convey, or to convey by deed themselves; for where an agent has the power to sell real estate, the authority to execute the proper instruments required by law to carry such sale into effect is necessarily incident. (*Blum* v. *Robertson,* 24 Cal. 127; *Valentine* v. *Piper,* 22 Pick. 85; 33 Am. Dec. 715, 719; *People* v. *Boring,* 8 Cal. 406, 408; *Fogarty* v. *Sawyer,* 17 Cal. 589, 591; Bishop on Contracts, 1st ed., sec. 347.) The plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other developed by the proofs. (*Maynard* v. *Ins. Co.,* 34 Cal. 48; 91 Am. Dec. 672; *Mondran* v. *Goux,* 51 Cal. 151; *Burke* v. *Levy,* 68 Cal. 32; *Dougherty* v. *Matthews,* 35 Mo. 520; 88 Am. Dec. 126; *Turner* v. *Walker,* 3 Gill & J. 377; 22 Am. Dec. 329.) A broker can only recover commissions when he has brought a purchaser to the vendor who is willing to deal with him upon the terms proposed in a manner satisfactory to the vendor, and by showing that he was the efficient agent and procuring cause of the sale. (*McGavock* v. *Woodlief,* 20 How. 221; *Wylie* v. *Marine National Bank,* 61 N. Y. 415; *Sibbald* v. *Bethlehem Iron Co.,* 83 N. Y. 382; 38 Am. Rep. 441; *Dolan* v. *Scanlan,* 57 Cal. 261; *Masten* v. *Griffing,* 33 Cal. 111; *Heyn* v. *Philips,* 37 Cal. 529; *Phelan* v. *Gardner,* 43 Cal. 306; *Gonzales* v. *Broad,* 57 Cal. 224; *Tombs* v. *Alexander,* 101 Mass. 255; 3 Am. 349.) It must further appear that the broker performed the duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer, unless the delay was caused by the negligence, fault, or fraud of the owner. (*Fultz* v.

Wimer, 34 Kan. 576; *Wilson* v. *Sturgis,* 71 Cal. 226; *Zeimer* v. *Antisell,* 75 Cal. 509.) A real estate broker is not entitled to commissions for making a sale of real estate for his principal, unless he strictly performs the services required of him according to the authority conferred upon him. (*Wilson* v. *Sturgis,* 71 Cal. 229; *Masten* v. *Griffing,* 33 Cal. 111; *Sibbald* v. *Bethlehem Iron Co.,* 83 N. Y. 378; 38 Am. Rep. 441.) The plaintiffs must fail, because the purchaser was not bound by the contract to make any purchase. (*Minturn* v. *Baylis,* 33 Cal. 129; *Joseph* v. *Holt,* 37 Cal. 250; *Huff* v. *Shepard,* 58 Mo. 242.) There is no right to commission until the purchase-money has passed and the sale is effected. (*Power* v. *Kane,* 5 Wis. 265; *Stewart* v. *Fowler,* 37 Kan. 677; *Richard* v. *Jackson,* 31 Md. 250; 1 Am. Rep. 49; *Sibbald* v. *Bethlehem Iron Co.,* 83 N. Y. 378; 88 Am. Rep. 441; *Zeimer* v. *Antisell,* 75 Cal. 509.) There is a complete failure of proof of the cause of action set out in the complaint, and not a variance within the meaning of sections 469 and 470 of the Code of Civil Procedure. (Code Civ. Proc., sec. 471; *Maynard* v. *Ins. Co.,* 34 Cal. 48; 91 Am. Dec. 672; *Mondran* v. *Goux,* 51 Cal. 151; *Burke* v. *Levy,* 68 Cal. 32; *Masten* v. *Griffing,* 33 Cal. 111; *Hawkins* v. *Roberts,* 45 Cal. 38; *Christian Col.* v. *Hendley,* 49 Cal. 347; *Hinkle* v. *R. R. Co.,* 55 Cal. 627; *Whitney* v. *Purrington,* 59 Cal. 36.)

Baker & Grant, for Respondents.

The authority given to "article" with the purchaser authorized the contract of sale. (Webster's Dict., tit. "article"; Rapalje and Lawrence's Law Dict., 80, 81.) Where the language used indicates more than a mere broker's authority, the court must so find. (*Rutenberg* v. *Main,* 47 Cal. 219; Civ. Code, secs. 1636, 1641, 1649, 1650, 1654, 1655.) By failure to object to the form of the contract or deed at the time of tender, objection thereto was waived, and cannot be urged for the first time as a defense to commissions. (Code Civ. Proc., sec. 2076; Civ.

Code, sec. 1503; *Blood* v. *Shannon,* 29 Cal. 394, 395.) The vendor cannot escape liability for commissions by refusing to receive the purchase-money and execute the conveyance. (*Heyn* v. *Philips,* 37 Cal. 529; *Phelan* v. *Gardner,* 43 Cal. 310, 311; *Gonzales* v. *Broad,* 57 Cal. 224; *Middleton* v. *Findlay,* 25 Cal. 81.)

WORKS, J.—Plaintiffs are real estate and insurance agents. They claim that the defendant employed them to sell for him certain real estate on certain terms and conditions, which they fulfilled, but that notwithstanding defendant's agreement to pay their commissions for making the sale which he authorized, he has refused to pay them; and to recover what is due them, they have brought this suit. They recovered a judgment for the sum of $2,103.50, with interest thereon from the fifth day of May, 1887, and costs, from which, and an order refusing a new trial, this appeal is taken by the defendant.

The contract or agreement under which the plaintiffs undertook to sell the land for the defendant is as follows:—

"This writing, made this fifteenth day of April, A. D. 1887, witnesseth: That I, W. H. Soule, of the county of Yolo, in the state of California, have this day placed with George D. Fiske & Co. for sale the following property, of which I am the owner in fee, situate in section ——, township ——, range —— (see plat), county of Yolo, and state of California, to wit: Consisting of about six hundred acres of land, being the southerly half of the tract known as the John M. Rhodes ranch, in Capay Valley. Price, $45 per acre (net) without crops, or $47.50 per acre (net) with the crop. Terms of payment as buyer and seller may agree. The said property to remain in the hands of George D. Fiske & Co. for sale or exchange for thirty days from the date hereof, and I hereby agree that if, at the expiration of that time, five

days' notice by me in writing of the withdrawal has not been given them, this agreement shall continue in full force until I give such notice,—hereby authorizing George D. Fiske & Co. to sell the aforesaid property, and article with purchaser for the same, as my agents, according to price and terms of payment above written, or any price or terms of payment which I may agree to take other than the above, and agreeing with them that if the same be sold or exchanged during the time it is in their hands, no matter by whom, I will pay them a commission of all I receive over and above the price above mentioned on amount of said sale or exchange. And I further authorize George D. Fiske & Co., to advertise the said property to the amount of $——. It is further understood by me, before signing this agreement, that George D. Fiske & Co. will pay out of their commission all expenses of advertising done by them.

"W. H. SOULE. [Seal.]"

Indorsed: "We hereby accept and agree to the terms of the within instrument this fifteenth day of April, A. D. 1887. GEORGE D. FISKE & Co."

The contract of sale which plaintiffs made with the purchaser is as follows:—

"$500. Received of John D. Stephens the sum of five hundred dollars ($500), the same being a part of the purchase-money for the following described piece or parcel of land situate, lying, and being in Capay Valley, Yolo County, California, formerly known as part of the John M. Rhodes tract, being the same land bought by me from John M. Rhodes. Said land being bounded on the north and east by H. Hammel and Cache Creek, on the south by Winters and Palmer, and on the west by the west line of the Rancho Canada de Capay; containing five hundred acres of land. The remaining portion of the purchase-money, to wit, the sum of twenty-eight thousand six hundred dollars, to be paid on or before

the twelfth day of May, 1887, by John D. Stephens or his assigns. In consideration of which the said land is to be conveyed free of all encumbrances to the said John D. Stephens or his assigns.

"Dated Woodland, California, April 23, 1887.

"W. H. SOULE,

"By GEO. D. FISKE & Co., his Agents."

The defendant refused to convey the property, after a tender of the money specified in this agreement, and also refused to pay the plaintiffs their commissions.

It is contended by the appellant that the plaintiffs were not entitled to recover, because the contract of sale was for $45 per acre *with* the crops, when the limit of their authority to sell was for that price *without* the crops, and $47.50 per acre with the crops. But the sale was made for a sum in gross which amounted to more than $47.50 per acre. There were 601 acres of land, and it was sold for $29,100, which amounted to $48.41 per acre. So that, conceding that the contract of sale included the crops growing on the land, the sale was for more than the highest amount the plaintiffs were required to sell for, and the sale was not beyond their authority. The sale agreed upon was for $48.50 per acre, supposing that there were 600 acres of the land, but it turned out that there were 601 acres. And when a tender was made to the defendant it was for $48.50 more than the written agreement called for, so as to cover the agreed price for the additional one acre.

The court below found, however, that the sale was for forty-five dollars per acre without the crops, and there was evidence to support this finding, so far as the verbal agreement between the plaintiffs and the purchaser was concerned, but not as to the written contract between them. The contract bound the defendant to convey the land without any reservation of the crops. This written contract was binding on the defendant, if the plaintiffs had the power to make it, unless corrected on the

ground that by mistake it was not in accordance with the agreement actually made. Under its finding that the land was sold for $45 per acre without the crops, the court allowed the plaintiffs, as commissions, the difference between that sum and the sum of $29,148.50. The plaintiffs were bound by their agreement to account to the defendant for $47.50 per acre, if the crops went with the land, and were only entitled to the balance of the purchase price over and above that sum as their commissions, unless the defendant waived the form in which the agreement to sell and the deed tendered to him were made. We have seen that by the terms of the written agreement the crops must go with the land. Therefore the amount found in favor of the plaintiffs was excessive to the amount of $2.50 per acre upon the 601 acres of the land, if this written agreement was to be looked to alone. It may be that if the actual agreement was as claimed by the plaintiffs, and a tender and a demand for a deed containing a reservation of the growing crops had been made, the plaintiffs could recover the full amount claimed in any event; but this does not appear to have been done. But there is another ground upon which we think the plaintiffs were entitled to recover the whole amount of their commissions. The sale was reported to the defendant as a sale at forty-five dollars per acre without the crops. He asked the plaintiffs to sell the crops to the parties for $2.50 per acre if possible. The plaintiffs consented, and attempted to do so, but the purchasers stated that they did not want the crops, and refused to buy them. The form of deed presented to the defendant, when a conveyance was demanded of him, was an ordinary grant deed without any reservation of the crops. But the defendant did not refuse to consummate the trade on the ground that the deed was not in proper form, or on the ground that the sale was not in accordance with the written authority given by him. The evidence shows clearly

that it was the understanding of all the parties, the purchaser included, that the crops were not to pass. If any such objection had been made, there can be no doubt that a deed containing the necessary reservation would have been accepted. It seems not to have been observed by any of the parties at the time that the contract of sale or the deed proffered were not in the form necessary to carry out the agreement of the parties. The defendant refused absolutely to consummate the sale or to negotiate with reference to it. It is perfectly apparent that the fact that the contract and deed were not in proper form had nothing whatever to do with his refusal to execute the deed. This being the case, he should not be allowed to offer that as an excuse for not complying with his contract by way of defense to this action.

It is contended by the appellant that the contract given by the defendant to the plaintiffs did not authorize the plaintiffs to sell the land or to bind the defendant by their agreement to sell it, but only to secure a purchaser. This might be material if the action were by the purchaser to enforce a specific performance of the agreement to convey, but it is wholly immaterial in this case whether the power of the plaintiffs was to sell, or merely to procure a purchaser. They complied with their part of the contract. If the defendant did not see proper to convey to the purchaser they had procured, this was no reason why he should not pay their commissions. It is immaterial that the plaintiffs in their complaint construed and treated this as a power to sell, even conceding that it was not. The contract was set out and made a part of the complaint, and entitled them to whatever was authorized by its terms and the facts proved. The allegations were sufficient to entitle them to recover as mere brokers. (*Dolan* v. *Scanlan,* 57 Cal. 261.)

It is claimed by the appellant that the authority given by the contract was revoked before the sale was made.

But the court found to the contrary, and there was evidence to support the finding.

It is further contended that the contract of sale was not within the power of the plaintiffs, because it required the defendant to convey by general warranty against all encumbrances. But the evidence shows that when the tender was made no such deed was demanded, nor do we think the contract required any such deed. The deed demanded was, as we have said, an ordinary grant deed, and its form was not objected to, nor was there any claim that the property was encumbered or that there was any reason why the plaintiff could not or should not execute such a deed.

It is also insisted that the contract was unfair, and not mutual, because the purchaser was not bound, in any way, to pay the purchase-money, except by a forfeiture of the five hundred dollars cash payment. But this, if so, is immaterial. The whole purchase-money was tendered to the defendant when a deed was demanded of him, and before this commission was demanded.

It is further claimed that the sale was not made within the time limited by the contract. This is based upon the assumption that payment of the purchase-money was necessary to constitute a sale, which is not necessarily so. The purchaser could not be expected to pay the purchase-money before receiving a conveyance. Counsel say that the contract required a sale for cash. This we think is not so. By the terms of the contract the terms of payment were to be "as buyer and seller may agree." If this is to be construed as reserving to the defendant the right to agree in person upon the terms of payment, it is still clear that it did not impose upon the plaintiffs the duty of selling for cash. Besides, there could be no reasonable objection to the terms of payment when cash was tendered, and no such objection was made to the consummation of the sale.

Again, it is contended that the plaintiffs were not

entitled to recover until the purchase-money was paid.

It may be conceded that this would be so if the purchaser had failed to pay the purchase-money, but the defendant could hardly defend on this ground when the purchase-money was not paid, solely because he refused to accept it.

It appears, from the evidence, that the title to the property was not in the defendant, but in his wife. This was not material. He gave it to the plaintiffs to sell *as his property,* so stated in his contract, and the evidence is to the effect and the court found that the plaintiffs had no knowledge, until after they had made the sale, that the title was not in him. Under such circumstances his want of title could not affect the plaintiff's right to recover their commissions.

The court found on all the material issues; all of the findings necessary to a recovery are sustained by the evidence, and they support the judgment.

Judgment and order affirmed.

SHARPSTEIN, J., MCFARLAND, J., PATERSON, J., and THORNTON, J., concurred.

[No. 13980. Department Two.—January 3, 1891.]

O. L. ABBOTT, RESPONDENT, *v.* THE '76 LAND AND WATER COMPANY, APPELLANT.

LANDLORD AND TENANT—LEASE—OPTION TO PURCHASE—RENEWAL—PAROL EXTENSION OF OPTION—CLAUSE OMITTED BY AGREEMENT.—An option to purchase inserted in a lease for one year, with the understanding that the lease may be renewed from year to year, not exceeding two more years, and that the option may be exercised upon previous notice on the 1st of October in any year throughout the entire tenancy, at prices to be fixed by the lessor annually, continues under a renewed lease for a second year, though the clause mentioning the option is left out of the second lease, by agreement, as unnecessary, with the mutual understanding and agreement that the option was nevertheless extended.

ID.—PURCHASE PRICE.—The purchase price remains as specified in the lease for the first year, if the lessor did not avail himself of the right conferred by the terms of the contract to change the price for the second year, but merely refused to receive the money tendered, and repudiated the contract when the option was exercised under the second lease.

ID.—SPECIFIC PERFORMANCE—EVIDENCE—CORPORATIONS—DECLARATIONS OF SECRETARY—MANAGING AGENT.—In an action to enforce the option to purchase against the corporation lessor, statements made to the plaintiff by the secretary of the corporation, at the time of the renewal, as to the immateriality of the omission and the extension of the right of purchase under a general rule of the corporation, are admissible in evidence against the corporation, it appearing that the secretary had charge of its business, and acted for it in the leasing and selling of its lands.

APPEAL from a judgment of the Superior Court of Fresno County.

The following facts appear in the findings of the court: The defendant, since July 7, 1882, has been a corporation under the laws of the state of California, and is the owner of large bodies of land situated in the counties of Fresno and Tulare, and of certain waters, canals, and water rights, by which its lands could be irrigated. The principal business of the corporation is the sale of its lands, with the water and water privileges from its canals, to such persons as it could induce to buy the same, and also by farm leases on shares, or cropping contracts, to obtain revenue from the lands while they might remain unsold. To effect these purposes, the corporation defendant, on or about the sixteenth day of October, 1883, adopted a plan to induce farmers to take the lands upon leases on shares, or cropping contracts, for one year, with the privilege of extending the same from year to year, for a period of not to exceed two additional years, the tenant to have the option to buy the land leased by him, throughout the entire time while his lease existed, either by the original term of one year, or any extension of said term, at prices to be fixed by the corporation annually, the purchase price to be payable one fourth cash when the purchase should be made, and the balance

three years thereafter, the deferred payment to bear interest at the rate of eight per cent per annum, the tenant, if he should elect to buy, to notify the corporation before the first day of October of the year in which he made such election, and his purchase to be made as of that date, the corporation to have the right to change and fix the price of the lands leased before October 1st of each year, which price so fixed was to remain the price of the lands for the following year, and unless such change of price was made, that which had before been put on the land should remain until a change should be made, to take effect on the first day of October thereafter. To carry out this system, and to offer it to the public, the defendant caused to be printed maps of its lands, and pamphlets and circulars detailing and showing its system of leasing, and giving options to buy, and declared that it would give to all persons who should take its lands on farm leases, or cropping contracts, an option to buy the lands so taken respectively by them at any time during the existence of such leases or extensions thereof, at the prices so fixed. On December 7, 1885, the plaintiff, O. L. Abbott, leased 320 acres of the defendant's lands in Fresno County, under a farm lease, on shares, for one year embodying all the terms of the plan or system of the corporation defendant as above described, and fixing a price of fifteen dollars per acre for the lands if purchased on or before October 1, 1886, in accordance with the rules of the corporation, and giving the lessee the privilege of renewing the lease from year to year for a period not exceeding two years from the time of the expiration of the lease. Plaintiff elected to continue his lease and option to buy for the year after October 1, 1886, and gave defendant proper notice of his election. Defendant accepted the notice and demand for the extension. Defendant had found that the filling out of the portion of the blanks which referred to the options to buy made requisite a considerable amount of clerical labor and

consequent expense to the corporation, which it deemed needless, as by its system and rules all parties who took leases, or cropping contracts, had the option to buy at any time while the leases or extensions thereof existed, and as there were many leases, or farming contracts, in effect and operation, and the respective tenants or croppers had given notice of their respective elections to extend their leases for another year, the corporation defendant erased, by drawing red-ink lines over, the printed clauses in their forms relating to the option to buy in all extensions for the year from October 1, 1886, to October 1, 1887. The second paper was, in all respects other than the erasure, the same as the original, of which it was to be the extension. There was no consent by plaintiff to the erasure; but it was mutually understood and agreed upon by both parties that the option to buy continued, and was mutually intended to continue, under the extension, and so long as the lease, or cropping contract, between the parties existed. There was never any abandonment or waiver by plaintiff of the option to buy, or of his privilege to purchase under it. Before the expiration of the second year, plaintiff elected to purchase the lands leased by him, and tendered to the defendant one fourth of the purchase-money, and offered to comply in all respects with the terms of purchase contained in the first lease, the price not having been changed by any notice from the defendant. The defendant refused to accept the money, and denied the existence of any right of the defendant to purchase the leased land. On the trial, it was proved that S. F. Earl, the secretary of the corporation defendant, had charge of the business of making and renewing leases; that the renewal of plaintiff's lease was presented to him by Mr. Earl, and that he then stated that it was immaterial about that stipulation being in the lease, and that the board had made a general rule covering that whole ground. This evidence was objected to as not binding upon the defendant. The court rendered a decree speci-

fically enforcing the contract of purchase as claimed by the plaintiff.

Jarboe, Harrison & Goodfellow, for Appellant.

The written contract contained in the second lease is supreme, exclusive of the advertisements and all previous negotiations and communications between the parties. (Civ. Code, sec. 1625; *Insurance Co.* v. *Reese,* 8 Ga. 534.) There is no oral agreement of purchase with part performance, as the possession and improvements are not referable exclusively to the contract of sale as distinguished from the lease. (*Anson* v. *Townsend,* 73 Cal. 418; *Johnston* v. *Glancey,* 4 Blackf. 94; 28 Am. Dec. 45.) The opinion of Earl as to the immateriality of the omission from the lease was not admissible. The company is not responsible for his statements of opinion. (*Montgomery* v. *Keppel,* 75 Cal. 128; 7 Am. St. Rep. 125.)

Thompson & Thompson, for Respondent.

The privilege of purchase may be specifically enforced. (*De Rutte* v. *Muldrow,* 16 Cal. 505; *Laffan* v. *Naglee,* 9 Cal. 662; 70 Am. Dec. 678; *Hall* v. *Center,* 40 Cal. 63; Reed on Statute of Frauds, sec. 362.) The advertisements of defendant gave the option. (*S. P. R. R. Co.* v. *Terry,* 70 Cal. 484; *Boyd* v. *Brinckin,* 55 Cal. 427.) Declarations of an agent within the scope of his authority may bind or estop the principal. (*Simson* v. *Eckstein,* 22 Cal. 592, 593; *Garver* v. *Downie,* 33 Cal. 182.) The renewal lease was not a new contract. The option in the first lease was never given up, forfeited, or canceled.

Thornton, J.—The option in plaintiff to buy the land under the lease, or cropping contract, entered into by the plaintiff and defendant, bearing date the seventh day of December, 1885, continued for two years from the first day of October, 1886. It makes no difference that it was not inserted in the second lease.

It was left out of the second lease by agreement, as something unnecessary. The defendant had a right to change the purchase price during the execution of the lease, provided it did so prior to the 1st of October of each year. It never did change this price. It therefore remained as in the first contract. The plaintiff exercised and gave notice of his intention to purchase, under the option clause above mentioned, on the 3d of September, 1887, and then offered to pay the installment of the purchase-money then due, viz., one fourth of it, and interest on the portion not then due, and offered to comply in all respects with his contract. The defendant refused to receive the money, and repudiated its contracts with the plaintiff. We think that the judgment is correct, and in accordance with the principles of law, and should be affirmed.

The statements of the secretary of the defendant corporation made to plaintiff were properly admitted. It is evident that the conduct of the whole business was left by the company to him; that he was fully authorized to act, and did act, for the company in its dealing with plaintiff, and others in the like situation, in regard to the business connected with the leasing and disposition of its lands. The determination of this action by the court below is in accordance with well-settled legal principles. The record shows no error.

Judgment affirmed.

SHARPSTEIN, J., and MCFARLAND, J., concurred.

Hearing in Bank denied.

[Nos. 12992 and 13574. Department Two.—January 3, 1891.]

ADAM S. B. BAKER, RESPONDENT, *v.* JOHN BRICKELL ET AL. JOHN BRICKELL, APPELLANT.

PUEBLO LANDS — TITLE OF SAN FRANCISCO — TRUST — CONTROL OF GOVERNMENT.—The title of the city of San Francisco to the pueblo lands, as successor to the pueblo of San Francisco, was not an indefeasible estate, nor strict ownership, but was a restricted and qualified right to alienate portions of the lands to the inhabitants, and to devote the residue to public uses, and was in the nature of a trust for the benefit of the inhabitants; and its right of disposition and use was in all particulars subject to the control of the government.

OUTSIDE LANDS IN SAN FRANCISCO—ACT OF CONGRESS—TRUSTS—BONA FIDE POSSESSORS.—The legal title to outside lands in San Francisco passed to the United States from Mexico upon the acquisition of California, and passed to the city by the act of Congress of March 8, 1866, upon the trusts set forth in said act, in favor of persons in *bona fide* actual possession of the same at the date of its passage, by themselves or by their tenants.

ID.—POSSESSION OF HEAD OF FAMILY—SURVIVING WIFE—TRUST.—The grant of Congress by said act to the city was intended to be made in trust for the head of a family residing on the lands, and inured to the benefit of a surviving wife in *bona fide* possession with her children at the date of its passage by virtue of such possession, and not to the estate of her deceased husband, who held *bona fide* possession prior thereto, nor would she take title from the city in trust for the estate of her husband or for their children.

ID.—POSSESSION BY TENANT—CONVENTIONAL TENANCY — HUSBAND AND WIFE.—The "possession by tenant" spoken of in the act of Congress signifies possession by a conventional tenant, and does not apply to the possession of a surviving wife continued after the decease of the husband, which occurred before the passage of the act.

ID.—ACT OF CONGRESS—ORDER 800—ORDINANCE 822—LEGISLATIVE ACTS—BONA FIDE POSSESSION—CONVEYANCE—PRESUMPTION.—Where a conveyance was made by the city in pursuance of the act of Congress of 1866, and of order 800 and ordinance 822 of the board of supervisors, and of the acts of the legislature of 1868 and 1870 ratifying said order and ordinance, to a person in actual possession of outside lands, if it does not appear that any suit was pending against such person in regard to the land, it will be presumed that no suit existed, and that the possession was *bona fide*.

ID.—HOMESTEAD—ACT OF 1862—SURVIVORSHIP — DESCENT — BONA FIDE POSSESSION OF SURVIVING WIFE.—A homestead acquired under the act of 1862 on the death of either spouse vested absolutely in the survivor by descent, and need not be set apart by the probate court; and where it appears that the possession of outside lands by a surviving wife was under a legal devolution to her of the whole land as a homestead at the date of the act of 1866, the *bona fides* of her possession are beyond doubt.

ID.—TRUSTS—PARENT AND CHILD.—A trust arises from contract or from circumstances which affect the conscience of a party, and charge him with the rights of another, but cannot arise in respect of outside lands in favor of children, as against a surviving wife who acquired title thereto as a *bona fide* possessor, if she had no contract with her deceased husband, and owed no duty to her children in respect to the lands.

ID.—HUSBAND AND WIFE—DEATH OF HUSBAND—POSSESSION BEFORE ACT OF 1866.—The mere possession of outside lands by a husband, who died before the passage of the act of Congress of 1866, when the title was in the United States, conferred no rights upon him or his heirs, nor could he be the recipient of a grant after his death; but the donation given by the act inured directly to the surviving wife, who was then in *bona fide* possession.

ID.—ESTATE OF DECEASED HUSBAND—ADMINISTRATION BY WIFE—ESTOPPEL—MISTAKE OF LAW.—The fact that the surviving wife became administratrix of the estate of her deceased husband, and by mistake of law, in ignorance of her rights, inventoried outside lands as his property, which did not belong to his estate, but were her own property by operation of law, does not estop her from claiming the property as her own.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order denying a new trial.

The facts are stated in the opinion of the court.

E. J. & J. H. Moore, and *A. N. Drown,* for Appellant.

The decision in *Labish* v. *Hardy,* 77 Cal. 327, is desisive of the right of Mrs. Baker to take the title from the city in her own individual name and right. A like doctrine is held in *Kitts* v. *Austin,* 83 Cal. 167. The city had no ownership, but held the title in trust for *bona fide* occupants, and its right of disposition was subject to the control of the government. (*Townsend* v. *Greely,* 5 Wall. 326; *Grisar* v. *McDowell,* 6 Wall. 364; *Palmer* v. Low, 98 U. S. 16; *Trenouth* v. *San Francisco,* 100 U. S. 253; *Le Roy* v. *Cunningham,* 44 Cal. 599; *Dupond* v. *Barstow,* 45 Cal. 450; *Low* v. *Lewis,* 46 Cal. 549; *McManus* v. *O'Sullivan,* 48 Cal. 7, 17, 18; *Randall* v. *Austin,* 46 Cal. 54; *McCreery* v. *Sawyer,* 52 Cal. 257.) The homestead estate fell to the surviving spouse by the law of 1862. (Stats. of 1862, p. 519, sec. 4; *Estate of Wixom,*

35 Cal. 324; *Barber* v. *Babel,* 36 Cal. 16; *Rich* v. *Tubbs,* 41 Cal. 36; *Jarvis* v. *Hoffman,* 43 Cal. 314; *Mawson* v. *Mawson,* 50 Cal. 542; *Estate of Headen,* 52 Cal. 294; *Gagliardo* v. *Dumont,* 54 Cal. 496; *Herrold* v. *Reen,* 58 Cal. 443; *Bollinger* v. *Manning,* 79 Cal. 7.) Such an estate is not the subject of administration. (*Bollinger* v. *Manning,* 79 Cal. 7; *In re Burdick,* 76 Cal. 639; *Tyrrell* v. *Baldwin,* 78 Cal. 470; *In re Ackerman,* 80 Cal. 208; 13 Am. St. Rep. 116, and decisions there cited.) The probate proceedings were no estoppel. (*Riley* v. *Phel,* 23 Cal. 74; *Sulzberger* v. *Sulzberger,* 50 Cal. 385; *Anthony* v. *Chapman,* 65 Cal. 73; *Stockton B. & L. A.* v. *Chalmers,* 65 Cal. 93; *Fitts* v. *Cook,* 5 Cush. 596; *Breeze* v. *Brooks,* 9 West Coast Rep. 294; *Gragg* v. *Gragg,* 65 Mo. 343; *Leek* v. *Haynes,* 68 Mo. 13–17; *Trenton B. Co.* v. *Duncan,* 86 N. Y. 221; *Wendell* v. *Van Rensselaer,* 1 Johns. Ch. 344; *Storrs* v. *Barker,* 6 John's Ch. 168; 10 Am. Dec. 316; Bigelow on Estoppel, 425–503; Pomeroy's Eq. Jur., secs. 807–821.)

Kellogg & King, for Respondent.

The title was held by the city in trust for the heirs of John H. Baker. (*Rector* v. *Gibbon,* 111 U. S. 278; *Johnson* v. *Townsley,* 13 Wall. 72; *Lamb* v. *Davenport,* 18 Wall. 307; *McDonald* v. *Burton,* 68 Cal. 445; *Burton* v. *Burton,* 79 Cal. 490.) When Maria Baker acquired the city deed in the manner and under the circumstances shown, she held the title in trust for the benefit of the estate and the heirs of her husband. (*Hallette* v. *Collins,* 10 How. 174; *Minnesota* v. *Batchelder,* 1 Wall. 109; *Silver* v. *Ladd,* 7 Wall. 219; *Salmon* v. *Symonds,* 30 Cal. 301; *Wilson* v. *Castro,* 31 Cal. 421; *Wasley* v. *Foreman,* 38 Cal. 90; *Bird* v. *Wilcox,* 45 Cal. 686; *Hollinshead* v. *Simms,* 51 Cal. 158.) Brickell took his mortgages with full knowledge of the interest of plaintiff, who has a right to follow the estate into his hands. (*Oliver* v. *Piatt,* 3 How. 333.) The burden was on Brickell to show title under the homestead claim, which he failed to do. (*Estate of Delaney,*

37 Cal. 182.) A homestead could not be claimed upon lands held in common. (Smythe on Homesteads, sec. 126.) The homestead property was not relieved from administration until a homestead was set apart by the probate court. (*Rich* v. *Tubbs,* 41 Cal. 34; *Schadt* v. *Heppe,* 45 Cal. 433.) Mrs. Baker was estopped by the probate proceedings and distribution of the estate. (Code Civ. Proc., sec. 1637; Probate Practice Act, sec. 237; *Estate of La Coste,* Myrick's Prob. Rep. 67; *Williams* v. *Price,* 11 Cal. 213; *Racouillat* v. *Requena,* 36 Cal. 654.) Her final account was settled, and in it she charged herself with the entire ranch (less the parts sold) as the property of the estate. (*Estate of Scott,* 52 Cal. 406; *Reynolds* v. *Brumagim,* 54 Cal. 255; *Stubblefield* v. *McRaven,* 5 Smedes & M. 130; 43 Am. Dec. 505; *Tobelman* v. *Hildebrandt,* 72 Cal. 314.) This account was settled December 20, 1867, and acquiesced in to the present time by all the parties concerned.

THORNTON, J.—In this case there are two appeals presented by defendant Brickell. The first, 12992, from the judgment on the judgment roll, and the second, 13574, from the order denying Brickell's motion for a new trial. They are to be considered together.

The action is brought to establish a trust against defendant Brickell. The lands in controversy are portions of what is known as outside lands of the city and county of San Francisco, and not within that portion affected by the Van Ness ordinance. John H. Baker went into possession of the land in suit, called Baker tract, or Golden Gate ranch, on July 9, 1860. He purchased this and other lands within his possession from one James C. Garner. He was then a married man, and at the time above stated went into possession with his wife, Maria Baker (who is defendant Maria Baker Batchelder), and their children. John H. Baker died in March, 1863, leaving his wife surviving, with six chil-

dren, of whom the plaintiff was one, then an infant of tender years. The surviving wife, with her children, remained in possession of the land in controversy, and was in possession when the act of Congress of March 8, 1866, entitled "An act to quiet title to certain land within the corporate limits of the city of San Francisco," was passed, and before and some time after the passage of this act. (See this act in 14 Stats. at Large, page 4.)

At the time of the passage of this act, the legal title to this land was in the United States. The land granted by the act was within the corporate limits of the city of San Francisco, and the right and title of the United States was by it relinquished and granted to the city of San Francisco and its successors subject to certain reservations designated therein, upon the following trusts, viz.: That all the said land not heretofore granted to said city should be disposed of and conveyed by said city to parties in *bona fide* actual possession thereof by themselves or tenants on the passage of this act, in such quantities and upon such terms and conditions as the legislature of the state of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for pubilc use. A proviso follows the above, which has no bearing on the case, and need not be further adverted to.

It may be remarked here that no part of the land in suit was ever reserved or set apart by ordinance or otherwise for public use.

Some observations are here appropriate as to the nature of the title of the city successor to the former pueblo of San Francisco. The character of this title has been the subject of discussion in similar cases, both in the supreme court of the United States and in this court, and it may be regarded as settled law that the title of the pueblo, as well as that of the city, was not an indefeasible estate. Ownership of such lands cannot be strictly affirmed of either pueblo or

the city. The title amounted to a little more than a restricted and qualified right to alienate portions of the land to the inhabitants for building or cultivation, or both, or to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. The right of this possession and use was in all particulars subject to the control of the government. They would be held by the pueblo or city in trust for the benefit of the inhabitants, and its right of disposition was subject to be modified and taken away by the government. (On this point see *Townsend* v. *Greely,* 5 Wall. 326; *Grisar* v. *McDowell,* 6 Wall. 364; *Palmer* v. *Low,* 98 U. S. 16; *Trenouth* v. *San Francisco,* 100 U. S. 253; *Le Roy* v. *Cunningham,* 44 Cal. 599; *Dupond* v. *Barstow,* 45 Cal. 450; *Low* v. *Lewis,* 46 Cal. 549; *McManus* v. *O'Sullivan,* 48 Cal. 7, 17, 18; *Randall* v. *Austin,* 46 Cal. 54; *McCreery* v. *Sawyer,* 32 Cal. 257; *People* v. *Holladay,* 68 Cal. 442.)

The legal title to this land passed to the United States from Mexico on its acquisition of California, and passed to the city by the act of March 8, 1866, upon the trusts above set forth, for the benefit of such of its inhabitants as were in the *bona fide* actual possession of the same at the date of the passage of the act which is above referred to, viz., on the eighth day of March, 1866.

Now, who was in the *bona fide* actual possession of the land on the 8th of March, 1866? For whose benefit and behalf was the grant by Congress made? Obviously, Maria Baker. She was then, and before that date, an inhabitant of the city of San Francisco, and residing on the lands with her children. That the grant was made to the head of the family there can be no question, and Maria Baker was then head of her family. We consider this determined in *Labish* v. *Hardy,* 77 Cal. 327, where a similar question was determined on similar language in the grant made by act of Congress to the corporate authority of the town of Santa Cruz.

The only difference between that case and this is, that in the case cited, the surviving husband was held to be the grantee, and in this case, the surviving wife is the grantee. The possession in both cases was that of the head of the family, the husband in one case, and the wife or widow in the other. Here the husband and father was not in being when the act of Congress was passed in 1866. He had then been dead nearly three years. It goes without saying, that, then being dead, he could not take title under the grant, and, therefore, on his decease, the land did not become a part of his estate. It may be added here, that the tenant spoken of in the act of Congress must be held to signify the conventional tenant. (*Brooks* v. *Hyde,* 37 Cal. 374.)

Here there was no contract, either expressed or implied, from which the tenancy could be inferred, nor is there any reason to hold that Mrs. Baker became the tenant, in any sense, of her husband, on his decease.

To carry the act of the 8th of March, 1866, into execution, the board of supervisors passed an ordinance known as order 800, which was ratified and affirmed by the act of the legislature passed March 27, 1868. Order 800 was passed by the board of supervisors on the 14th of January, 1868. (See Stats. 1867–68, pp. 379 et seq.)

Subsequently, in 1870, another act of the legislature was passed to expedite the settlement of the land titles in the city and county of San Francisco, etc., forming order 866 of the board of supervisors of the city. (See Stats. 1869–70, p. 353.) This enactment was made to enable the parties entitled to procure conveyances of the title to these lands from the city and county of San Francisco.

Of the act of Congress, and of the ordinance of the city and county of San Francisco, and of the acts of the legislature, it may be remarked that nowhere in them is the title of any other person recognized or allowed, save those who were in actual *bona fide* possession on the 8th of March,

1866, by themselves or their tenants, except where the possessor had been ousted from his possession, which possession he might recover by suit. As there was no evidence of ouster here by Maria Baker, no question arose here as to ouster and recovery of possession by suit at law.

By the order 800, ratified as above, it was provided that a map or plan of these outside lands should be made and adopted by the board of supervisors above mentioned; that upon the completion of the map it should be deposited for public inspection in the office of the clerk of the board of supervisors, there to remain for a period of thirty days, notice whereof should be given by publication in three of the daily papers of the city during the time that the map should so remain in the clerk's office.

The occupant of any tract of land was required by order 800, ratified as above, to present a diagram of his land, and have it delineated on the map made by the supervisors. This delineation of a tract, however, could not be made on the map, unless all the taxes on it should have been paid for five fiscal years preceding the year beginning July 1, 1866. The claimant was also, before the title could be procured, required to surrender all claim to any streets and highways. By act of 1870 (Stats. 1869–70, p. 353), passed March 14th of that year, the claimant was empowered to file a petition for a grant from the city of the tract of land of which he was in possession as above mentioned. By the provisions of this act, the petitioner was to set forth in such petition, verified as required by the act, a claim that he or his tenants, or the persons through whom he claims or derives possession, had been, from and including the eighth day of March, 1866, and still was, in possession of a portion of such outside land, and that he, or the person through whom he claims or derives possession, has paid to the tax collector of the city and county of San Francisco the amount assessed by the outside land commission upon the land described in the

petition to pay for the land reserved for public uses provided for in section 10 of order 800, and has also paid the five years' taxes mentioned in section 4 of order 800, and all taxes levied on said lands for state and municipal purposes then remaining unpaid. The board of supervisors was—these before-mentioned acts having been done—required to proceed to act on his petition. The claimant was required to make proof of the facts stated in his petition before a committee of the board of supervisors styled the outside land committee. After the proofs were closed, the outside land committee was required to consider the same, and to make such report and recommendation thereon as shall seem to them just and proper in the premises. The committee was required to file with the clerk of the board the testimony taken by it, and its report, which report was to be submitted to the board of supervisors for their approval; and if, in their judgment, the claim of the petitioner was well founded, the board was, by an order entered in their minutes, to adjudge and award a grant of his lands to the petitioner, less the amount reserved for public use. The board was thereupon required to give public notice of their award by notice published at least once a week for three successive weeks in a daily newspaper published in the city and county of San Francisco, which notice should specify the name of the applicant, the date and filing of his petition, and the tract of land awarded, by a good and sufficient description thereof, proof of publication of which notice was to be made in the manner then or thereafter required by law for the proof of publication in civil process. (Act of 1870, sec. 2, p. 354.)

The third section of the act provides for the execution of a deed of conveyance signed by the mayor of the said city and county, and acknowledged and delivered by him to the applicant of the tract of land awarded to him, to which shall be attached the corporate seal of the city and county above named, provided the petitioner, before

receiving the deed aforesaid, shall quitclaim and personally deliver the possession of all lands claimed by him, reserved for public purposes, and for the use and benefit of the city and county, provided there is no suit pending between the petitioner and some third person. A reference will be further made to this last-mentioned proviso hereafter in this opinion.

By the third section it is provided that the conveyance executed under the provisions of this act shall operate as an acknowledgment, on the part of the city and county aforesaid, that the title to the land described in it has passed under and by virtue of order 800 and ordinance 822, and of the several acts of Congress, and of the legislature ratifying said order and ordinance, under the authority of which the same have been passed. The said conveyance shall likewise operate to grant, convey, remise, and release to the party, his heirs and assigns, named therein, the lands in such conveyance described, and all the estate and interest, present and future, of the city and county of San Francisco, in and to such lands.

On the tenth day of January, 1873, Maria Baker, after due and regular proceedings had under order 800, and the acts of the legislature of 1868 and 1870, was granted a conveyance, in the usual form, of all the lands described in the complaint as being part of the Baker ranch, which conveyance was executed to her by the authorities of the city and county, as required by the act of 1870, above referred to, and in the mode therein set forth, conveying to her the title of the city and county of San Francisco, as declared in the fifth section of the act of 1870, the provisions of which have been fully stated above. When the conveyance was made to her it does not appear that any suit in regard to the land was pending against her. Not appearing, this court must regard it as not existing.

Maria Baker intermarried with one David F. Batch-

elder, and subsequently she and her husband, Batchelder, executed to the defendant Brickell divers mortgages on the land conveyed to her by the deed of the city and county aforementioned, and on other lands, to secure the payment of divers sums of money, amounting in the aggregate to the sum of forty-two thousand five hundred dollars. These mortgages were, subsequently, regularly foreclosed, and sold under a decree of foreclosure regularly given, made, and entered, and by such decree and the sale thereunder, and the deed of the sheriff of the city and county of San Francisco executed to defendant Brickell, the title of said Maria Batchelder became vested in Brickell.

It further appears, from the finding herein, that, on the 23d of September, 1862, Maria Baker and her husband, John H. Baker, executed a declaration of homestead, in due form of law, embracing the land involved in this litigation.

This homestead estate, under the provision of the act of 1862, under which the declaration was made and recorded, on the death of either spouse vested absolutely in the survivor. Such is the effect of the fourth section of the act of 1862 (see *Herrold* v. *Reen,* 58 Cal. 445–447), where the point is considered and decided. (See also cases cited in the opinion in that case.) It was not necessary that this homestead estate should be set apart by the probate court to the surviving spouse. It vested in the survivor by descent. (*Herrold* v. *Reen,* 58 Cal. 445–447.) So on the death of John H. Baker, in March, 1863, the homestead estate vested in his surviving wife, Maria Baker. Under such circumstances, the contention cannot be upheld that the possession of Maria Baker was not, on the 8th of March, 1866, *bona fide.* She was not only in actual possession, but she was there having title to the whole land, as against any heir of John H. Baker, by the legal devolution to her of the whole land as homestead. In such a state and condition, the

bona fides of her possesison could not be impeached. Its *bona fides* were beyond a doubt.

This conclusion disposes of this case; for in no event would any trust arise here in favor of any of the children, issue of the marriage of Maria Baker and her husband, John H. Baker. The plaintiff could have no claim to any portion of the land. There is nothing on which to build a trust. A trust arises from contract, or from circumstances which affect the conscience of a party, and charge him with the rights of another. Here there was no contract between Maria and John H. Baker constituting a trust, and no circumstances affecting the conscience of Maria Baker, charging her with any duty to her children in regard to the lands in suit.

John H. Baker had no title to this land. His settlement and possession on it were merely permissive. He acquired no right to it by such possession. The title was then in the United States, to give it to whom it thought best, and when it did make a donation, in March, 1866, he could not be the recipient of a grant. He had then departed this life, and could take nothing by the act of Congress passed on the day above mentioned. The possession on that day was that of his wife, the then head of the family, Maria Baker.

She owed no duty to her children, save support, maintenance, and education,—none in regard to this land. Independent of the homestead which had arisen under the act of 1862, which, as we have seen, passed to her on the death of her husband, we think she was, on the 8th of March, 1866, in the actual *bona fide* possession of the land; but when the homestead right is taken into account, there can, in our judgment, be no question or doubt as to the *bona fides* of her actual possession.

She was therefore the grantee, under the act of Congress, of the land in question. The grant to Maria Baker was a pure donation, and how any trust in favor of any other person could arise out of it, we cannot surmise.

Now, are we without authority to sustain this conclusion? In *Labish* v. *Hardy,* 77 Cal. 327, a like question came before this court for discussion, and its determination was in accordance with what is stated herein. In that case, the decision was in relation to the provisions of the act of Congress of July 23, 1866, relinquishing and granting the lands within the limits of the town of Santa Cruz to the corporate authorities thereof, in trust, and with authority to convey them to the parties in the actual *bona fide* occupancy thereof at the date of the passage of the act. On May 13, 1871, the corporate authorities of the town conveyed the premises to William H. Hardy, father of appellant, and husband and grantor of respondent.

The appellant claimed that the rights and equities acquired by her parents, through occupancy and possession of the premises, constituted community property, one half of which belonged to her mother, and at her death, by the law then existing, descended to and vested in her children. The mother of appellant died in 1856, ten years prior to the passage of the act of Congress in July, 1866.

The court, per Sharpstein, J., said: "The beneficiaries under the act of Congress were clearly those in the *bona fide* occupancy of the land in the town of Santa Cruz at the date of the passage of said act, which was ten years after the death of appellant's mother. An occupancy which terminated ten years before the passage of the act would not be a *bona fide* occupancy at the time of its passage. We are unaware of any law under which a bare occupancy of any public land of the United States vests in the occupant any right or equities in or to the land so occupied. We think no property was acquired in the premises in controversy, by either of the parents of appellant, prior to the passage of the act of July 22, 1866."

This judgment was concurred in by five of the justices

of this court, and there was no dissent. It is clearly correct, and meets approval.

The other circumstances, viz., the fact that Maria Baker qualified and was appointed as administratrix of John H. Baker, and put the land in suit in the inventory returned by her to the probate court as assets of her intestate's estate, and entered on the administration of the estate, are entirely immaterial. We are aware of no law by which a person appointed administrator loses his land by so acting.

There is no estoppel on Maria Baker to claim her own property, under such circumstances. She no doubt acted in this matter through ignorance of her rights, *inops consilii,* or if advised at all, from having been improperly counseled. It is useless to dwell on the points adverted to, in relation to the administration, which are totally immaterial, and cannot, in any proper view of them, affect the decision of this case.

The judgment and order are reversed, and the cause remanded for a new trial, in accordance with the views expressed in this opinion.

So ordered.

McFARLAND, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

BEATTY, J., dissenting.—Respondent's petition for a rehearing of this cause having been denied by the court, I cannot allow the occasion to pass without expressing my dissent from the conclusion of the Department upon the point principally considered in the opinion of Justice Thornton.

If the decision of the court had been rested upon the proposition that under the homestead laws of California Mrs. Baker, on the death of her husband, became by right of survivorship the sole and exclusive owner, as against her children, of the entire estate in the lands

covered by their joint declaration of homestead,—irrespective of its value at the time of such declaration, or of her husband's death,—I might not have dissented from that view.

But the judgment and order of the superior court are reversed, and the cause is remanded for a new trial, to be had in accordance with the views expressed in the opinion, which thereby become, and must remain, the law of the case.

Amongst the views so expressed is one from which I feel constrained to express my dissent.

It is held—as I understand the opinion—that Mrs. Baker, by mere force of the act of Congress of 1866 granting to the city of San Francisco the outside lands, and independent of any right accruing to her under our homestead laws, became entitled to a conveyance from the city of all the lands left in her possession by the death of her husband, to be held by her in her own right, to the exclusion of her children. This conclusion is based upon a narrow and literal construction of the clause of the act requiring the city to convey the lands granted to the parties in *bona fide* actual possesison thereof by themselves or tenants at the date of the passage of the act. It assumes either that the person lawfully in possession, by himself or tenant, at the date of the passage of the act, was the sole object of the bounty of the government, without regard to the character or capacity in which he had obtained or held the possession, or it assumes that when John H. Baker died, in 1863, leaving his widow and minor children in possession of the land in controversy, he had no estate in the land to which they could succeed, and that the possession so devolved upon her as head of the family was held by her absolutely in her own right, and not in any representative capacity.

If this is true,—if the children of John H. Baker inherited no interest in this land from him when he died,—it must be equally true that if their mother also had

died before the passage of the act of 1866, they would have inherited nothing from her. What, then, would have happened? Being minors and orphans, they and the land would naturally have passed into the charge and custody of a guardian, who would have been found in the *bona fide* actual possession of the land, as head of the family, at the passage of the act of 1866. Such guardian would have been just as clearly within the liberal terms of the act in the case supposed, as Mrs. Baker actually was in the case as it is; and if the representative character in which she held the possession, and her trust relation to her children, must be ignored, so must the representative character and trust relation of the guardian have been ignored; and on precisely the same reasoning which sustains the exclusive right of Mrs. Baker to receive a conveyance of the land, it must have been held that the guardian was entitled to a conveyance of the land, to the exclusion of his wards. But I venture to say that no court would have carried the principle here decided to this its logical and necessary consequence. In my opinion, it would have been held, in the case supposed, that it was the duty of the guardian to obtain a conveyance of the lands from the city, and that he would hold them, when so conveyed, in trust for his wards, according to their several and respective rights as heirs and successors of their deceased parents. And, upon the same grounds, I am of the opinion that Mrs. Baker, when she obtained a conveyance of these lands (considering the matter without reference to her rights under the homestead law), held them in trust for her children, according to their respective rights as heirs of her deceased husband.

[No. 12962. Department Two.—January 3, 1891.]

JAMES T. RYAN, RESPONDENT, v. GEORGE S. FITZGERALD, APPELLANT.

CLAIM AND DELIVERY—FORM OF VERDICT—DELIVERY OF PROPERTY REPLEVIED.—In an action of claim and delivery, it is not necessary that the verdict shall provide for any delivery of the property, if such could be had.

ID.—CONCLUSION OF LAW — JUDGMENT.—When the verdict finds that plaintiff has the right of possession, the right to a delivery, if it can be had, or if not, to the value of the property as found by the jury, in the alternative, is a conclusion of law, which the judgment must contain, but not the verdict.

ID.—DAMAGES—TAKING AND DETENTION—PRESUMPTION.—Damages may be claimed and recovered in the action for both taking and detention, and when the verdict is for a sum certain as damages, it will be presumed to cover both grounds, if both are alleged in the complaint.

ID.—UNCERTAINTY OF VERDICT — APPEAL — OBJECTION FOR FIRST TIME.—An objection to the form of a verdict upon the ground of uncertainty in the statement of damages must be taken in the court below, and cannot be urged on appeal for the first time.

ID.—VERDICT AND JUDGMENT FOR PART OF PROPERTY—RES ADJUDICATA.—When the plaintiff obtains a verdict and judgment for only part of the property sued for, and the verdict and judgment are silent as to the remainder, it must be held that plaintiff was denied any further relief, and he is precluded from further litigation as to the remainder.

ID.—RETURN OF PROPERTY NOT RECOVERED—APPEAL—PRESUMPTION —MODIFICATION OF JUDGMENT.—If the defendant has asked for a return of the property replevied, and it does not appear that he has given proper bond and sureties for the return, it must be presumed that the whole of the property claimed has been delivered to the plaintiff; and if the plaintiff's verdict and judgment are limited to a recovery of part only of the property, and no relief is awarded to the defendant, the judgment will be modified, on appeal, so as to require the return of the residue to the defendant.

APPEAL from a judgment of the Superior Court of Alameda County.

The facts are stated in the opinion.

George W. Lagan, for Appellant.

D. M. Connor, M. C. Hassett, and *James F. Tevlin,* for Respondent.

FOOTE, C.—This action of claim and delivery was for the recovery of the possession of certain horses and colts, and two mowers, or their value, and damages for their taking and detention.

The defendant admits the taking of the property, as a constable, under a writ of execution on a judgment against Jeremiah Ryan, the assignee of the plaintiff.

The cause was tried by a jury, who returned this verdict: "We, the jury in the above-entitled cause, find for the plaintiff the possession of the following property: The horses and colts described in the complaint, or their value, the sum of $1,225, with damages in the sum of $48.55."

Upon that verdict a judgment was rendered for the plaintiff, that he have and receive possession of the property mentioned in the verdict, specifying it, "or for the sum of $1,225, the value thereof, in case a delivery thereof cannot be had; and in case a delivery of any portion thereof cannot be had, then for the value of such portion of said property, together with $48.55 damages, and for costs, taxed at $39.50." From this judgment an appeal is taken on the judgment roll, and the appellant claims a reversal thereof, because,—"The verdict is uncertain in this: It does not provide for a delivery of the property to the plaintiff, if delivery can be had, and does not, nor does the judgment, state for what the damages are given. The complaint claims damages for taking, as well as for detention. Damages for detention only are permitted, and so far as appears, the damages may have been awarded for the taking only."

It was unnecessary that the verdict should have provided for any delivery of the property, if such could be had. When the jury found the right of possession to be in the plaintiff, then the conclusion of law followed, as provided in section 667 of the Code of Civil Procedure, that he was entitled to delivery, if it could be had; and if not, to the value of the property, as found by the jury,

in the alternative. This the judgment must contain, but not the verdict. For as to the judgment, the form of it must be as provided in the section of the Code of Civil Procedure *supra;* but section 627 of the same code, which prescribes what the verdict of the jury shall contain, requires no finding as to delivery at all.

As to the second matter of objection, that in reference to the uncertainty of the verdict for damages, whether it is given for *taking* or *detention,* it may be said that in an action of the kind in hand, damages may be claimed and recovered for both taking and detention. (*Arzaga* v. *Villalba,* 85 Cal. 191.) And the verdict being for a sum certain for damages, not specifying which kind, will be presumed to cover both grounds alleged for damage. Again, the objection, going to the form of the verdict, should have been taken in the court below, and it is too late to urge it here. (*Campbell* v. *Jones,* 41 Cal. 515.)

It is urged further, that because the jury found for the plaintiff for the possession of a part of the property only, and as to the balance their verdict was silent, that a judgment based thereon is void, as not responsive to the issue raised by the pleadings, that is, the right of possession of the whole of the property sued for.

Conceding that if such a verdict had been rendered for the defendant, that it would have been insufficient to support the judgment under the rule laid down in *Muller* v. *Jewell,* 66 Cal. 216, yet the defendant here does not allege, in his answer, that the plaintiff has the possession of any of the property, but that an officer of the law has it, under a writ in this case. The plaintiff has only obtained judgment for a part of the property, and has no right to possession of the balance. There is nothing to show but that the defendant is entitled thereto, and that it cannot be withheld from him. The verdict and judgment here being silent as to the balance of the property, it must be held that the plaintiff was

denied any further relief than he has obtained, and he is precluded from any further litigation with the defendant, as to this balance. (*Gray* v. *Dougherty*, 25 Cal. 277.)

But in this case, the defendant has asked for a return of the property, and it does not appear that he has given bond and sureties who have justified, and in that case it would have been the sheriff's duty, under section 515 of the Code of Civil Procedure, to have delivered the property to the plaintiff, and it must be presumed that he has done so. Therefore, since the plaintiff has been determined by the verdict and judgment not to be entitled to this balance of the property, the judgment here should be so modified as to require his return of it to the defendant; and in other respects the judgment should be affirmed, and we so advise.

BELCHER, C. C., and HAYNE, C., concurred.

The COURT.—Ordered the judgment be modified in accordance with the views above expressed, and as so modified, the judgment is affirmed.

[No. 20698. Department One.—January 4, 1891.]

THE PEOPLE, RESPONDENT, *v.* LLEWELLYN A. POWELL, APPELLANT.

CRIMINAL LAW—TRIAL BY JURY—COMMON LAW.—By the common law, the trial of all crimes is required to be by a jury selected from the vicinage or county where the crime is alleged to have been committed.

ID.—CONSTITUTIONAL LAW—BILL OF RIGHTS.—Section 7 of the bill of rights, in the state constitution, providing that "the rights of trial by jury shall be secured to all, and remain inviolate," refers to the right as it existed at common law.

ID.—PENAL CODE—UNCONSTITUTIONAL PROVISION—CHANGE OF PLACE OF TRIAL—APPLICATION OF DISTRICT ATTORNEY.—Subdivision 2 of section 1033 of the Penal Code, authorizing a change of the place of trial of a criminal action to another county, upon application of the district attorney, without the consent of the defendant, where no jury can be obtained for

the trial of the defendant in the county where the action is pending, is unconstitutional and void.

ID.—JURISDICTION—VENUE.—The superior court of another county than that in which the crime was committed has no jurisdiction to try the case, where the venue was changed to such county upon application of the district attorney without the consent of the defendant.

ID.—CONSTRUCTION OF PENAL CODE—CHANGE OF PLACE OF TRIAL—INSUFFICIENT APPLICATION.—If it be conceded that subdivision 2 of section 1033 of the Penal Code is valid, it must be strictly construed and strictly pursued; and an application on the part of the district attorney showing merely that a fair and impartial jury cannot be obtained therein, and not showing that all legal means had been exhausted to procure a jury, and that no jury can be obtained therein, is insufficient.

ID.—COMPETENCY OF JURORS—IMPARTIALITY.—A juror is not necessarily incompetent because he is not impartial; and proof that a fair and impartial jury cannot be obtained is not equivalent to proof that no jury can be obtained.

ID.—HOMICIDE—EVIDENCE—REBUTTAL—HABIT OF DECEASED—DECLARATIONS.—Upon trial of a charge of murder, evidence that the defendant believed that the deceased was armed at the time of the killing cannot be rebutted by evidence that the deceased was not in the habit of carrying arms, and had so stated on various occasions, and had refused to go armed on the morning of the homicide, the declarations of the deceased not appearing to have been communicated to the defendant.

ID.—CHARACTER OF DECEASED FOR PEACE AND QUIETNESS.—Evidence to sustain the character of the deceased for peace and quietness cannot be given by the prosecution unless it has been attacked by the defendant; nor can such character be proved by evidence that he was not in the habit of carrying arms, or of his refusal to do so.

ID.—DECLARATIONS OF DECEASED—QUARRELS—REBUTTAL.—Evidence that the deceased had said that he had quarreled with several persons is incompetent, and if given by the defendant, without objection, cannot be rebutted by proof that the deceased was not in the habit of going armed.

ID.—CONVERSATIONS OF WITNESS WITH THIRD PERSONS—STRIKING OUT EVIDENCE.—When a witness for the prosecution has testified to conversations with third persons, which the prosecution fails to connect with the defendant by proposed proof, a motion of the defendant to strike out such conversations should be sustained.

ID.—DECLARATIONS OF DEFENDANT—THREATS AGAINST WITNESS.—Evidence of a conversation of a witness with the defendant, relating to threats of the defendant toward the witness, on the supposition that he was the author of a newspaper article published by the deceased, is incompetent against the defendant, it not appearing that the conversation was communicated to the deceased.

ID.—SELF-DEFENSE—REASONABLE FEAR OF BODILY HARM—DANGEROUS CHARACTER OF DECEASED—WARNING OF DEFENDANT.—Where the defendant claims to have killed the deceased in self-defense, while acting with reasonable prudence, and under

an honest belief that he was in imminent danger of death or of great bodily injury, it is competent for him to show that before the shooting he was informed that the deceased was a dangerous man, and such information need not have been brought home to the deceased; but it is not competent merely to prove that the defendant was warned to look out for the deceased.

ID.—ARGUMENT—PRIVATE COUNSEL—ASSISTANCE OF DISTRICT ATTORNEY—DISCRETION.—It is discretionary with the trial court to allow private counsel to be employed to assist the district attorney in the prosecution of a defendant charged with murder, and to open and close the argument to the jury, with the consent and acquiescence of the district attorney.

ID.—BURDEN OF PROOF—PREPONDERANCE OF EVIDENCE—REASONABLE DOUBT.—Proof of the homicide by the prosecution does not cast upon the defendant the burden of proving, by a preponderance of evidence, that the killing was justifiable or was only manslaughter, but it is sufficient if the evidence adduced by the defendant raises a reasonable doubt of his guilt.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order denying a new trial.

The facts are stated in the opinion of the court.

George C. Ross, and *George A. Knight,* for Appellant.

Attorney-General Johnson, Eugene N. Deuprey, Samuel M. Shortridge, and *E. F. Fitzpatrick,* for Respondent.

WORKS, J.—The appellant was charged by information, in the county of San Mateo, with the crime of murder, alleged to have been committed in that county. He was twice tried in said county, and the jury failed to agree upon a verdict at each trial. Without any effort made to procure a third jury, the district attorney moved the court, under section 1033 of the Penal Code, for a change of venue to another county. The material part of the application was as follows:—

"Said district attorney, on behalf of the people of the state of California, hereby makes application to said court for a change of venue from said county of San Mateo, to some convenient county, of the above case of the People of the State of California *v.* Llewellyn A. Powell,

on the grounds and for the reasons *that a fair and impartial jury cannot be obtained for the trial of said case in said county of San Mateo,* the same being the county where said action is now pending, and hereby states the following facts and causes for making said application, viz.: That the above-named defendant is charged, by information filed in said superior court of said county of San Mateo, with the crime of murder, alleged to have been committed in the month of November, 1887, in killing, in said county, at said time, one Ralph S. Smith; that said defendant has had two trials in said superior court on said charge; that the first trial was had in April, 1888, and the second trial in August, 1888; that at said first trial there were summoned from all parts of said county, to appear before said court, to serve as jurors in said case, seventy-two citizens, and of said number sixty-seven were examined before a jury could be obtained in said case; that at said second trial there were summoned from all parts of said county, to appear before said court, to serve as jurors in said case, 184 citizens, and of said number 173 were examined before a jury could be obtained to try said case; that said county is small in size and population, and a large number of its citizens whose names appear upon its assessment roll are Italians and Portuguese, and are disqualified from serving as jurors, in consequence of not understanding the English language; that, also, a large number of those citizens whose names appear upon the assessment roll of said county live in the city and county of San Francisco, and are therefore not liable to jury duty in said county of San Mateo; that said case was so horrible in its nature that it attracted the attention of the people of and has been fully discussed in all parts of said county of San Mateo; that said case has also been discussed, more or less, by the citizens summoned to appear to serve as jurors as aforesaid; that there are two local weekly newspapers in said county, having a general circulation therein, and the newspapers

of the city and county of San Francisco also have a widespread circulation throughout said county of San Mateo, and by and through the columns of the newspapers aforesaid, the facts of said case, and the trials thereof, have been fully discussed before the citizens of said county of San Mateo.

"For the reasons herein set forth, said district attorney says that *a fair and impartial jury cannot be obtained to try said case in said county of San Mateo,* and said district attorney therefore prays that said court make an order transferring said action of the People of the State of California *v.* Llewellyn A. Powell, now pending in said court as aforesaid, to some convenient county free from like objections."

This application was supported by the following affidavit of the district attorney:—

"George H. Buck, being duly sworn, says that he is the district attorney of said county of San Mateo, and is the same person who made and signed the foregoing application; that as such district attorney he makes said application; that he has read said application, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true."

In addition to this affidavit there were several others, by citizens of said county, in which each of the affiants, after alleging his residence in the county and acquaintance with the people thereof, alleged that he knew the contents of the affidavit of the district attorney, and that "said affidavit is *well founded and true.*"

The assessor of the county also made affidavit that he had examined the last assessment of the county, and that there were about six hundred persons among those whose names appeared on the assesment roll who had the necessary qualifications and were competent to serve as jurors of said county. The sheriff of the county also

made the following affidavit in support of the application:—

"W. H. Kinne, being duly sworn, says that he is now, and has been for more than two years last past, the sheriff of said county; that at the two trials of the above case, in said county, he summoned most of the jury in both of the said trials of said case; that in doing so he was obliged to and did go to and visit all parts of said county; that he was a candidate for re-election at the last election, in the fall of 1888, for the office of sheriff of said county, and during the said campaign he visited all portions of said county many times; that he has also seen many people of and from all parts of said county, at the county seat, to wit, at Redwood City, during the past year; that he has had an opportunity to and has discussed the merits of the case of the People of the State of California *v.* Llewellyn A. Powell, now pending in said superior court, and that he understands the feelings of the people in regard to said case, and has often heard them express their opinion about said case; that from such expression of the people so interviewed, he says *that a fair and impartial jury cannot be obtained* to try said case in said county."

The defendant objected to the granting of the change of venue, and in opposition to the application therefor, filed the affidavit of one of his attorneys and seventeen other citizens of the county, to the effect that they were residents of the county and knew many of the other residents thereof, and that in their opinion a fair and impartial jury could be obtained in said county to try the defendant.

The application was granted, and the venue changed to the city and county of San Francisco. When the case reached that county, the defendant objected to being tried therein, on the grounds, in substance, that the offense was charged to have been committed in the county of San Mateo; that the superior court of that

county alone had jurisdiction to try the defendant; and that the court of the city and county of San Francisco had no jurisdiction in the matter, and moved that the cause be remanded to the county of San Mateo for trial. The objection and motion were overruled, the defendant put upon his trial, convicted of manslaughter, and sentenced to the state's prison for the term of ten years. He moved for a new trial, which was denied, and now appeals to this court.

The change of venue was granted under section 1033 of the Penal Code, as amended, which provides: "A criminal action may be removed from the court in which it is pending, ... 2. On the application of the district attorney, on the ground that from any cause *no jury can be obtained for the trial of the defendant* in the county where the action is pending."

The appellant contends, first, that this section of the code, so far as it authorizes a change of venue on the application of the district attorney without the consent of the defendant, is in conflict with section 7 of the bill of rights, contained in the constitution of this state, which provides: "The right of trial by jury shall be *secured* to all, and remain *inviolate*."

The precise point urged upon us is, that the effect of this clause in the bill of rights is to preserve and continue in force the right of trial by jury *as it existed at common law,* and that the common-law right was to a trial by jury selected from the vicinage or county. This calls upon us to determine,—1. What the common-law right of trial by jury was; and 2. Whether or not the right is the same under our constitution. We think the common-law right of trial by jury is clearly and definitely stated by Mr. Blackstone in his Commentaries (book 4, page 350), as follows: "When, therefore, a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which coun-

try the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto;* that is, freeholders, without just exception, *and of the visne, or neighborhood;* which is interpreted to be of the county where the fact is committed." And Mr. Cooley, in his work on Constitutional Limitations, 5th ed., page 392, says: "The jury must also be summoned from the vicinage where the crime is supposed to have been committed." Again, in Story on Constitution: "By the *common law,* the trial of all crimes is required to be in the *county* where they were committed. Nay, it originally carried its jealousy still further, and required that the jury itself should come from the *vicinage* of the place where the crime was alleged to be committed." (Story on Constitution, secs. 1769, 1779, 1781, 1791. See also *Stuart* v. *Kimball,* 43 Mich. 448.)

There can be no doubt that such was the common-law right of trial by jury. We are led to inquire, therefore, whether the same right is given, or preserved, by our constitution, and if so, whether the section of the Penal Code under consideration is in conflict with this constitutional right. Our constitution does not define the right of trial by jury. It was a right then existing, the extent, scope, and limitations of which were well understood, and the constitution simply provides that such right shall be secured, and remain inviolate. If the right at common law was as above stated, there can be no question but that an act of the legislature authorizing the trial of a defendant out of the county where the offense is charged to have been committed is an abridgment of the right, and for that reason void. Such statutes have been almost uniformly condemned as unconstitutional in other states. (*Kirk* v. *State,* 41 Tenn. 344; *Wheeler* v. *State,* 24 Wis. 52; *Osborn* v. *State,* 24 Ark. 629; *State* v. *Howard,* 31 Vt. 414; *Ex parte Rivers,* 40 Ala. 712; *State* v. *Knapp,* 40 Kan. 148.)

It is contended, by the respondent, that in the states in which these cases were decided the constitutions provided, in express terms, that one charged with crime should be entitled to a trial by a jury selected from the county or district where the offense is charged to have been committed, and therefore the statutes referred to were in direct conflict with the express requirements of the constitutions, while in this state the constitution contains no such requirement. As to most of the states, the fact contended for is true, but not as to all of them. But can this make any difference? Does not our constitution confer upon a defendant charged with crime precisely the same right, although not expressed in terms? We have seen that this was the well-understood common-law right. This court has said that it is this same right that is held inviolate by our constitution. In *Koppikus* v. *State Capital Commissioners,* 16 Cal. 253, in discussing the effect of this constitutional provision, the court said: "The provision of the constitution, that 'the right of trial by jury shall be secured to all, and remain inviolate forever,' applies only to civil and criminal cases in which an issue of fact is joined. *The language was used with reference to the right as it exists at common law.* It is true that the civil law was in force in this state at the time of the adoption of the constitution; but its framers were, with few exceptions, from states where the common law prevails, and where the language used has a well-defined meaning. The people who, by their votes, adopted the constitution, at least a vast majority of them, were also from countries where the common law is in force, and they looked upon the right secured as the right there known and there held inviolate. It is in this common-law sense that the language has always been regarded by the courts of this state. It is a right 'secured to all,' and 'inviolate forever,' in cases in which it is exercised in the administration of justice according to the course of the common law as that law is understood in the several

states of the Union." (See also *Cassidy* v. *Sullivan,* 64 Cal. 266.)

It is true, the question before the court, in the cases cited, was as to the class of cases triable by jury; but the language used would have been just as appropriate and applicable if the question now before use had been under consideration. Mr. Cooley, in his work on Constitutional Limitations, in discussing the effect of such a constitutional provision as ours, says: "Accusations of criminal conduct are tried, at the common law, by jury; and wherever the right to this trial is guaranteed by the constitution, without qualification or restriction, it must be understood as retained in all those cases which were triable by jury at the common law, *and with all the common-law incidents to a jury trial,* so far, at least, as they can be regarded as tending to the protection of the accused. . . . . Many of the incidents of a common-law trial by jury are essential elements of the right. The jury must be indifferent, between the prisoner and the commonwealth; and to secure impartiality, challenges are allowed, not only for cause, but also peremptory, without assigning cause. *The jury must also be summoned from the vicinage where the crime is supposed to have been committed;* and the accused will thus have the benefit, on his trial, of his own good character and standing with his neighbors, if these he has preserved; and also of such knowledge as the jury may possess of the witnesses who may give evidence against him. He will also be able, with more certainty, to secure the attendance of his own witnesses." (Cooley on Constitutional Limitations, 5th ed., pp. 390–393.)

This same doctrine, and the reasons for upholding it, are more fully stated by the same learned author and judge in the case of *Stuart* v. *Kimball,* 43 Mich. 448, in which it is said:—

"The constitution of the state provides that 'the right of trial by jury shall remain, but shall be deemed

to be waived in all civil cases unless demanded by one of the parties in such manner as shall be prescribed by law.' (Art. 6, secs. 3, 27.) The right is to *remain*. What right? Plainly, the right as it existed before,—the right to a trial by jury, as it had become known to previous jurisprudence of the state. (*Underwood* v. *People*, 32 Mich. 1; 20 Am. Rep. 633.) The right is not described here; it is not said what shall be its incidents; it is mentioned as something well known and understood under a particular name; and by implication, at least, even a waiver of its advantages is forbidden. If the accused himself cannot waive them, plainly the legislature cannot take them away. The next section of the constitution repeats the guaranty of this method of trial 'in every criminal prosecution,' and nothing is better settled on the authorities than that the legislature cannot take away a single one of its substantial and beneficial incidents (Opinions of Judges, 41 N. H. 550; *Ward* v. *People*, 30 Mich. 116); and even the accused cannot waive any one of the essentials. (*Work* v. *State*, 2 Ohio St. 296; 59 Am. Dec. 671; *Cancemi* v. *People*, 18 N. Y. 128; *Hill* v. *People*, 16 Mich. 251; *Allen* v. *State*, 54 Ind. 461.)

"Now that in jury trial it is implied that the trial shall be by jury of the vicinage is familiar law. Blackstone says the jurors must be of the *visne*, or neighborhood; which is interpreted to be of the county where the fact is committed. (4 Bla. Com. 350.) This is an old rule of the common law (Hawk. P. C., b. 2, c. 40; 2 Hale P. C. 264); and the rule was so strict and imperative that if an offense was committed partly in one county and partly in another, the offender was not punishable at all. (Hawk. P. C., b. 2, c. 25; 1 Chitty's Crim. Law, 177.) This overnicety was long since dispensed with, but the old rule has in the main been preserved in its integrity to this day. It is true that Parliament, as the supreme power of the realm, made some exceptions, which are

enumerated by Mr. Chitty in his treatise on Criminal Law (vol. 1, p. 169), the chief of these being cases of supposed treason, or misprision of treason, examined before the privy council, and which, under the statute of Henry VIII., might be tried in any county, and offenses of the like character committed out of the realm, and which, by a statute of the same arbitrary reign, were authorized to be tried in any county in England. But it is well known that the existence of such statutes, with the threat to enforce them, was one of the grievances which led to the separation of the American colonies from the British empire. If they were forbidden by the unwritten constitution of England, they are certainly unauthorized by the written constitution of the American states, in which the utmost pains have been taken to preserve all the securities of individual liberty. It has been doubted in some states whether it was competent even to permit a change of venue on the application of the state, to escape local passion, prejudice, and interest. (*Kirk* v. *State,* 1 Cold. 344; *Osborn* v. *State,* 24 Ark. 629; *Wheeler* v. *State,* 24 Wis. 52.) But this may be pressing the principle too far. (*State* v. *Robinson,* 14 Minn. 447; *Gut* v. *State,* 9 Wall. 35.) But no one doubts that the right to a trial by a jury of the vicinage is as complete and certain now as it ever was, and that in America it is indefeasible. (1 Bishop's Crim. Law, 2d ed., sec. 552; Wharton's Crim. Law, sec. 277; *Paul* v. *Detroit,* 32 Mich. 108; *Ward* v. *People,* 30 Mich. 116.)"

This case was decided under a constitutional provision the same, in effect, as our own, and is directly in point.

It may be said that the effect of holding this statute to be unconstitutional will be to render it necessary, in a case where no jury can be obtained in the county, that a defendant be discharged or held in confinement for an indefinite time, until such changes take place in the county that a jury can be had; but we cannot take away from the defendant a right conferred upon him by the

constitution, on the mere ground that such a result may follow in rare cases. The right is one that has always been regarded as of great importance, and has been preserved and continued in force by the constitution of the United States, and perhaps by the constitutions of every state in the Union. If it be allowed that the legislature can break in upon this right, and take it away or abridge it on the ground and for the reason stated in the statute under consideration, it must be admitted that it may do so for other reasons, and thus the right guaranteed by the constitution will be subject to modification at the will of the legislature, and this cannot be conceded. We are convinced that the section of the Penal Code, so far as it authorizes a change of venue, on the application of the district attorney, without the consent of the defendant, is unconstitutional and void; that the change of venue in this case was improperly granted; and that the court below had no jurisdiction to try the cause.

But if it were conceded that the statute is valid, the result of this appeal must be the same. The application for the change of venue, and the affidavits in support of it, were entirely insufficient to bring the case within the statute, or to authorize a change of the place of trial. The application was not made on the ground that *no* jury could be obtained in the county, but because a *fair and impartial* jury could not be obtained. As to what will constitute a fair and impartial jury, there may be many different opinions. The statement that such a jury could not be obtained was the statement of a mere conclusion, and the facts did not show that *no* jury could be obtained. There are two modes provided, by which a defendant or the people may avoid a trial by partial or unfair jurors; viz., challenges for cause, which exclude all persons from the jury who are legally incompetent to serve as such, and peremptory challenges, by which a party may relieve himself of jurors who he believes will not be fair and impartial jurors. This last

kind of challenge is limited, and it may happen that when a party's right of peremptory challenge is exhausted, there may remain on the jury persons who are not, in his estimation or in fact, fair and impartial, but who are competent jurors. The application, and the proof to support it, do not show that a jury of such persons as these might not have been obtained. It is perfectly clear that the intention of the legislature was to make a distinction between the grounds upon which the people and the defendant should be entitled to a change of venue. The defendant has only to show that a fair and impartial trial cannot be had in the county. (Pen. Code, sec. 1033.) The application before us would have been sufficient under that clause, but it is not sufficient under the clause relating to the right of the district attorney to a change of venue which provides that the change may be had where no jury can be obtained, which is quite a different thing, as we have attempted to show. A juror is not necessarily incompetent because he is not impartial. He may favor one party or the other, and yet, if he has not formed or expressed an opinion as to the merits of the cause, he cannot be challenged for cause. For this reason, proof that a *fair and impartial* jury cannot be obtained is not equivalent to proof that *no* jury can be obtained. A statute of this kind, if valid, should be strictly construed, and if it could be enforced at all, in our judgment the change should not be granted until all legal means to procure a jury had been exhausted, and no jury could be obtained. It should not be allowed to rest upon the mere opinion of persons, however numerous, that a jury could not be procured.

The conclusion we have reached on this point is decisive of this appeal, but there are other questions presented, which may arise on another trial, which we feel it our duty to decide.

The prosecution was allowed, over the objection of the defendant, to prove in rebuttal that the deceased was not

in the habit of carrying arms; that on various occasions he had so stated; and that, on the morning of the shooting, he had refused to go armed, when it was suggested that he had better do so. We have looked in the transcript in vain for any evidence on the part of the defendant which could justify or call for any such evidence in rebuttal. There was evidence tending to show that the defendant believed the deceased to have been armed at the time he shot him. This rendered it competent for the prosecution to prove that, as a matter of fact, he was not armed at that time, but it did not justify the proof as to his general habit with respect to the carrying of weapons, or his declarations with reference to the matter, not made in the presence of the defendant, and not shown to have been communicated to him prior to the shooting. There was no evidence on the part of the defendant going to show that the character of the deceased for peace and quietness was bad; therefore the evidence cannot be justified on the ground that it tended to show his good character in these respects. Evidence to sustain his character could not be heard unless it had been attacked (*People* v. *Anderson,* 39 Cal. 704); and if it could, it would not have been competent to prove it by evidence that he was not in the habit of carrying arms, or that he had refused to do so.

On cross-examination of one or more of the witnesses for the prosecution, the defendant asked whether the deceased had not had quarrels with several persons named, and it was admitted that the deceased had so stated. There was no objection to this evidence by the prosecution. It was clearly incompetent, and if it had been objected to, would no doubt have been excluded. It is claimed that this evidence on the part of the defense rendered the above-mentioned proof competent. We do not think so. In the first place, the evidence on the part of the defense was incompetent, as we have said; but if it were not, we do not see how the evidence offered in

rebuttal, that the deceased was not in the habit of going armed, tended to rebut the proof that he had stated to some one that he had quarreled with certain persons.

There was also evidence admitted, in behalf of the prosecution, of conversations between the witness Mrs. Willis and third parties, not in the presence of the defendant, and with which he was in no way connected. This evidence should have been excluded. It was admitted by the court below upon the assurance of counsel for the defendant that it would be brought home to the defendant, which was not done. The same may be said of the testimony of the witness Glennon, of conversations between Mrs. Willis and himself. The prosecution having failed to connect the defendant with the subject-matter of the conversation, the defendant moved to strike out the evidence. The motion was denied. This was error. The evidence should have been stricken out. The same witness, Glennon, was also allowed to testify to a conversation with the defendant. The ill-feeling which resulted in the death of Mr. Smith, at the hands of the defendant, grew out of an article published in a newspaper of which the deceased was proprietor. The conversation testified to by Glennon was with reference to this article, and tended to show that the defendant believed the witness was the author of the article, and abused him, and threatened to get even with him; that in the same connection he made abusive remarks about one Mrs. Willis, and that, subsequently, during the same day, he returned, and stated to Glennon that he had learned that he was not the author of the article, and apologized for the language he had used. This evidence was well calculated to prejudice the jury against the defendant, and was immaterial and incompetent. If it had been shown to have been communicated to the deceased, it might have tended, in some small degree, to excuse his conduct toward the defendant at the time of the shooting; but it was not shown that it was communicated to him. It could hardly be

claimed that the threat of the defendant to "get even" with Glennon was evidence tending to prove that he killed the deceased, or the motive of the killing. And if this were not so, that part of the conversation relating to Mrs. Willis, and which the defendant moved specially to strike out, was clearly incompetent.

It is contended by the appellant that the court below excluded evidence offered by him to the effect that he was told before the shooting that the deceased was a dangerous character, and that he had better beware of him, and that this was error. The defendant claimed, and introduced evidence tending to show, that in firing the shot which caused the death of deceased, he acted in self-defense. In connection with the evidence as to what occurred at the time of the shooting, it would no doubt have been competent for the defendant to show that before the shooting he was informed that the deceased was a dangerous man. (*State* v. *Lull,* 48 Vt. 586.)

Where a defendant claims to act in self-defense, any evidence tending to show that he acted as a reasonably prudent man would have acted under the circumstances is competent. (*People* v. *Iams,* 57 Cal. 119, 130; *People* v. *Westlake,* 62 Cal. 307.)

In this case, the evidence tended to show that the defendant was attacked by the deceased, and in the encounter that followed shot and fatally wounded him. In judging whether the defendant acted with reasonable prudence and caution, and in the honest belief that he was put in imminent danger of death or great bodily injury, it was proper that the jury should know, if such were the fact, that he had been informed beforehand that the man that attacked him was a dangerous character, and so believed at the time, as such information and belief might reasonably influence the conduct of a prudent man under such circumstances. Such evidence does not rest upon the necessity of showing that the communication was brought home to the deceased, as

counsel for respondent contend. The sole object of it is to show the state of mind of the defendant at the time of the shooting, and for this purpose it was proper, and should have been admitted. There may be some doubt whether the questions put to the witnesses were such, in form, as to raise the point, but the question has been presented on its merits here. The form of the questions were not objected to in the court below, nor are they here. In the effort to prove a certain state of facts, either the question put to the witness should disclose clearly what it is proposed to prove, or a proposition to prove certain facts should be submitted to the court below, and refused, in order to present the question in this court. Neither was done here, and we are led to believe, by certain questions put to the defendant on the same subject, that the communication to the defendant was not of the kind claimed by the appellant. It certainly was not competent to show that the defendant was warned to "look out" for the deceased, or the like. This would be quite a different thing from proving that the deceased was a dangerous man, and one who might be expected to go to extreme measures if he should attack the defendant. For these reasons, if no other error appeared in the record, the cause would not be reversed on this ground.

The rulings of the court in excluding certain questions asked the witness Mrs. Smith, widow of the deceased, on cross-examination, with reference to certain articles appearing in the paper formerly owned by her husband, after the first trial of this case, and excluding said articles when offered in evidence, were not erroneous.

There was no error in allowing private counsel, employed to assist the district attorney in the prosecution of the case, to open and close the argument. The court below must be left to determine upon the propriety of allowing such a course to be taken, and so long

as private counsel conduct the prosecution properly, we see no reason for holding that the entire argument may not be made by them, with the consent and acquiescence of the district attorney and the trial court.

The court below gave the following instruction, which is complained of by the appellant: "In this case, the *homicide* having been *established by the state,* unless the testimony of the state proves that the offense was manslaughter, or unless such testimony tends to show that the homicide was excusable or justifiable, the burden of proof is upon the defendant to show, *by a preponderance of evidence,* that the *crime* was only manslaughter, or was justifiable."

This instruction was erroneous, because the homicide being established by the state, it cast upon the defendant the burden of proving, *by a preponderance of the evidence,* that the killing was justifiable, or only manslaughter. (*People* v. *Bushton,* 80 Cal. 160; *People* v. *Elliott,* 80 Cal. 296; *People* v. *Lanagan,* 81 Cal. 142.)

Judgment and order reversed, and cause remanded, with instruction to the court below to remand the cause to the superior court of the county of San Mateo for further proceedings.

McFARLAND, J., and SHARPSTEIN, J., concurred.

DE HAVEN, J., concurring.—I concur in the judgment. The second subdivision of section 1033 of the Penal Code is clearly unconstitutional. There was also error in the giving of the instruction referred to in the opinion of Mr. Justice Works. Upon the other points therein discussed, I express no opinion.

THORNTON, J., concurring.—I concur in the above, except as to the instuction discussed in it. I am of opinion that the instruction is sound law, and that there was no error in giving it.

Hearing in Bank denied.

[No. 14010. In Bank.—January 4, 1891.]

MARY COFFEY, RESPONDENT, *v.* GRAND COUNCIL, PETITIONER.

MANDAMUS — SETTLEMENT OF EXCEPTIONS — LACHES.—*Mandamus* will not lie to compel the judge to settle a bill of exceptions or statement when the counsel for the moving party failed to appear at the time fixed for the settlement, and thereafter withdrew the draught and amendments from the control of the judge, and held them for a month before presenting them again for settlement, without excuse for the delay.

ID.—INADVERTENCE.—The fact that the failure to appear at the hour fixed for the settlement of the statement was through inadvertence cannot be considered in the supreme court upon application for a *mandamus* to compel the settlement. The only power to relieve from the inadvertence is in the court below, and not in the supreme court.

ID.—SERVICE OF PETITION AND WRIT—DISMISSAL OF PROCEEDING.—The failure to serve a copy of the petition and writ upon the opposite party, as required by rule 28 of the supreme court, is ground for dismissing the petition for the writ of mandate, if no offer is made to comply with the rule.

APPLICATION for writ of mandate to Hon. J. P. Hoge, Judge of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

W. F. Stafford, for Petitioner.

Oscar T. Schuck, and *H. H. Reid,* for Respondent.

PATERSON, J.—This is an application for writ of mandate to compel Hon. J. P. Hoge, a judge of the superior court, to settle a bill of exceptions in the case of Coffey *v.* The Grand Council of the Young Men's Institute, and should be entitled Grand Council *v.* Hoge, Judge.

On the petitioner's own showing, we think it is not entitled to the writ prayed for.

After judgment in the court below, in favor of the plaintiff, the defendant in due time served its notice of intention to move for a new trial and proposed statement. Proposed amendments were served January 30,

1890, and on February 3d defendant served notice that they were not accepted, and that the proposed statement and amendments would be presented to the judge on February 10, 1890, at ten, A. M. Counsel for the plaintiff appeared before the judge at the hour named, but no one appeared on behalf of the defendant, nor was the proper statement presented until two o'clock of the day named, when its counsel went to the chambers of the judge and asked permission to withdraw the proposed statement and amendments, for the purpose of seeing if the attorneys for the respective parties could not agree upon a settlement. Two days later, he called at the office of the plaintiff's attorney for a voluntary settlement, but the latter refused to consider the proposal, claiming that defendant had lost the right to a settlement by reason of its laches. Thereupon defendant's counsel incorporated all of the proposed amendments in the statement, and presented an engrossed copy of the same to the judge for his certificate on March 11, 1890, but the latter refused, and still refuses, to sign the same, claiming that he had lost jurisdiction to act upon it.

The petitioner alleges that its counsel was engaged in causes pending in other departments of the superior court, and for that reason overlooked the hour for which the settlement of the statement had been fixed. If there is any power to relieve a party from the effect of such an inadvertence, it is in the court below, not here. The matter was presented to the judge, and the petition shows that the petitioner was given repeated hearings on its application, all parties being present. As stated before, if there was any power anywhere to relieve the petitioner from its default, and if good cause could be shown in that behalf, the court below was the proper tribunal to determine the matter, and we must assume that it did not abuse its discretion on the showing made by the parties.

Furthermore, it appears that counsel for the petitioner

did not ask the judge to settle the statement when he appeared before the latter at two o'clock, and that he did not leave the papers with the judge, but withdrew them. Instead of going immediately to the attorney for the adverse party to see if a voluntary settlement could be had, he held the papers for two days, and after being informed that no settlement could be made, the reasons for which were given, he held them for about a month before any attempt was made to secure the certificate of the judge. No excuse is offered for these delays.

Counsel for petitioner asked at the hearing to be allowed to amend the petition, so as to set out the conversation between himself and the judge which occurred at two o'clock, February 10th, as fully as it is set out in his affidavit in opposition to the motion made in Department One of this court to dismiss the appeal. If the petiton can be amended in any case after an alternate writ has been issued, and the respondent has appeared and answered the same, it would be useless to allow it in this case. We have looked into the affidavit referred to, and there is nothing there alleged which would have any material bearing on the question before us.

No copy of the petition or of the writ was served on the plaintiff, and respondent has moved to dismiss on that ground. Rule 28 requires the petitioner to serve copies on the party in interest. This would, of itself, be sufficient ground for dismissing the petition, no offer havng been made to comply with the rule.

The demurrer is sustained, without leave to amend, and the alternate writ is discharged.

WORKS, J., SHARPSTEIN, J., and MCFARLAND, J., concurred.

Rehearing denied.

[No. 14010. Department One.—January 4, 1891.]

MARY COFFEY, RESPONDENT, v. THE GRAND COUNCIL, APPELLANT.

APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT—SETTLEMENT OF STATEMENT.—An appeal from the judgment will be dismissed for failure to file the transcript within the time limited therefor, notwithstanding a statement on moton for new trial which appellant intends to use on the appeal remains unsettled, if it appears that the judge has properly refused to settle the statement, and that there can be no statement on appeal.

MOTION to dismiss an appeal from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion, and in the opinion upon the application for a writ of mandate in the same case, *ante,* p. 367.

W. F. Stafford, for Appellant.

Oscar T. Schuck, and *H. H. Reid,* for Respondent.

PATERSON, J.—This is a motion to dismiss the appeal for failure to file the transcript. The certificate of the clerk makes a *prima facie* case in favor of the moving party, but appellant claims that there is a statement on motion for a new trial which remains unsettled by the judge of the court below, and which he intends to use on appeal.

The judge of the court below, after repeated hearings on appellant's application to settle the statement, has refused to certify to it, on the ground that it has lost its right to a statement by its failure to present the same to him for settlement. An application was made to this court in Bank for a writ requiring the judge to settle the statement, and the petition has been denied. The facts shown there (*Coffey* v. *Grand Council, ante,* p. 367) are the same as the facts here.

If we assume that the judge had the power in his discretion to settle the statement after February 10th, it still appears that after repeated applications he has refused to settle the statement, and we must assume that he will continue to do so, and that there can therefore be no statement on appeal.

The appeal is dismissed.

WORKS, J., and DE HAVEN, J., concurred.

Hearing in Bank denied.

[No. 13562. In Bank.—January 4, 1891.]

JAMES W. SHANKLIN, APPELLANT, *v.* JOHN MCNAMARA ET AL., RESPONDENTS.

PUBLIC LANDS—ACT TO QUIET LAND TITLES—MEXICAN GRANT—PATENT — EJECTMENT — EVIDENCE.—A patent issued by the United States under the act of Congress of July 23, 1866, to quiet land titles in California, to a *bona fide* purchaser of lands within the exterior boundaries of a Mexican grant, which were excluded from the final survey, is *prima facie* evidence of a right in the patentee to recover the lands patented in an action of ejectment, and is conclusive, unless it can be successfully impeached by the defendants.

ID.—IMPEACHMENT OF PATENT — EVIDENCE — SWAMP AND OVERFLOWED LAND—CERTIFICATE OF PURCHASE.—The patent so issued cannot be impeached by evidence that the land patented was swamp and overflowed land, notwithstanding the defendants hold a certificate of purchase thereof from the state, and it is not error to exclude such evidence.

ID.—SWAMP-LAND IN MEXICAN GRANT—CONSTRUCTION OF ACT OF 1850.—Though the act of September 28, 1850, operated as a grant of swamp-lands to the state *in præsenti*, it was not the intention of Congress to grant thereby to the state of California swamp-lands lying within the exterior boundaries of a Mexican grant, though such lands were finally excluded from the survey.

ID.—ACTION OF LAND DEPARTMENT — CONTEST — ADJUDICATION OF FACTS.—The decision of the land department of the United States upon questions of fact coming before it upon a contest of the right to enter and purchase lands from the United States is conclusive upon the parties before it and those claiming under them, if the decision is free from fraud and fraudulent imposition.

ID.—FRAUD—COLLATERAL ATTACK—RELIEF IN EQUITY.—Fraud or fraudulent imposition upon the land department in the ob-

taining of a patent cannot be set up by way of collateral attack upon the patent in an action of ejectment brought by the patentee, and the patent can only be assailed on these grounds by a proceeding in equity.

ID.—ESTOPPEL OF STATE AND ITS GRANTEE—QUALIFICATIONS OF PATENTEE — LOCATION WITHIN MEXICAN GRANT — CHARACTER OF LAND.—If the state is a party to a contest before the land department in respect to the entry and purchase of lands from the United States by a purchaser from a Mexican grantee under the act of 1866, both the state and its grantees are bound by the decision of the land department as to the qualification of the purchaser, and that the land was within the exterior boundaries of a Mexican grant, and also as to the character of the land as not being swamp and overflowed, provided its character was distinctly adjudged by the decision.

ID.—INSUFFICIENT DECISION AS TO CHARACTER OF LAND.—Where the language of the decision of the land department as to whether the land was or was not swamp and overflowed is indefinite and ambiguous, and does not distinctly adjudicate the character of the land, it cannot be regarded as determining that it was not swamp and overflowed, notwithstanding a patent was awarded to a purchaser from a Mexican grantee under the act of 1866.

ID.—JURISDICTION OF LAND DEPARTMENT — LAND PREVIOUSLY GRANTED.—The land department of the United States cannot grant land; and it is not within its power to award to one person land which by an act of Congress has been previously granted to another, and its decision so awarding it is a nullity, and passes no title.

MEXICAN GRANT—EXTERIOR BOUNDARIES—RIGHT OF POSSESSION.—The grantee of a Mexican grant of a smaller quantity of land to be selected within a larger area is entitled to the possession of all the land within the exterior boundaries of the grant until the specific quantity granted is set off by a final survey; and this right of possession is property, full protection of which was guaranteed by the treaty of Guadaloupe Hidalgo, and by the constitution and laws of the United States.

SWAMP AND OVERFLOWED LANDS—DELAY IN DETERMINING CHARACTER OF LAND—EVIDENCE.—Where the land in controversy was surveyed in 1869, and never returned certified or listed to the state as swamp-land, and was patented in 1882 by the United States to a *bona fide* purchaser from a Mexican grantee, pursuant to the act of Congress of 1866, the delay of a swamp-land claimant under a certificate of purchase from the state issued in 1856 to have any steps taken to have the character of the land determined, as provided by said act, is strongly persuasive, though not conclusive, evidence that the land was never swamp and overflowed.

APPEAL from a judgment of the Superior Court of Sutter County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

M. E. Sanborn, and *A. L. Hart,* for Appellant.

The swamp-land act operated as a grant *in præsenti.* (*Railroad Co.* v. *Smith,* 9 Wall. 99; *Martin* v. *Marks,* 97 U. S. 345; *Rice* v. *Sioux City and St. Paul R. R. Co.,* 110 U. S. 695; *French* v. *Fyan,* 93 U. S. 169; *Summers* v. *Dickinson,* 9 Cal. 554.) Neither government is bound by the action of the other, and the character of the land may be shown as against a claimant under either government. (*Kernan* v. *Griffith,* 27 Cal. 87; 31 Cal. 461; *Robinson* v. *Forrest,* 29 Cal. 317; *Thornton* v. *Thompson,* 28 Cal. 602; *Thompson* v. *Thornton,* 50 Cal. 142; *Kile* v. *Tubbs,* 59 Cal. 191; *Wright* v. *Roseberry,* 121 U. S. 488–521.) Lands within the exterior boundaries of a floating grant are public lands. (*United States* v. *McLaughlin,* 127 U. S. 452–457.)

J. H. Craddock, for Respondents.

The action of the land department is conclusive as to the character of the lands. (*Wright* v. *Roseberry,* 121 U. S. 488–521; *French* v. *Fyan,* 93 U. S. 169.) The state was concluded by the decision of the land department. The act of 1866 gave a *bona fide* purchaser from a Mexican grantee an exclusive right of purchase. (*Hosmer* v. *Wallace,* 97 U. S. 575–581; *Hess* v. *Bolinger,* 48 Cal. 352–354.)

THORNTON, J.—Ejectment. Judgment for plaintiff. Motion for a new trial by defendants denied, and appeal from the judgment, and the order denying the motion.

The plaintiff claims title to the land in controversy under a patent of the United States issued to Willard Hodges, dated December 15, 1882, which was put in evidence, as was also a conveyance of the tract by Hodges to the plaintiff. The claim of Hodges is under the seventh section of the act of Congress of July 23, 1866, entitled "An act to quiet land titles in California." (14 Stats. at Large, 220.) This section provides that when

persons in good faith, and for a valuable consideration, have purchased land of Mexican grantees or assignees, which grants have subsequently been rejected, or when the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continued in the actual possession of the same according to the lines of their original purchase, and when no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same, after having such lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required herein, under regulations to be prescribed by the commissioner of the general land-office. Hodges and Upham made proof before the proper land-office of their right to purchase the land in suit under the section of the act of 1866 above referred to, bringing themselves within its provisions, and were allowed to purchase, and did purchase and procure, on this proof and purchase, the patent of the United States above mentioned, under which the plaintiff asserts title. This patent establishes *prima facie* the right of the plaintiff to recover, and must be regarded as conclusive against the defendants, unless the latter can attack it, and successfully impeach its sufficiency to vest title in those claiming under it.

Defendants claim that the rights possessed by them entitle them to attack the patent. They say that, as a matter of fact, the land sued for was on the twenty-eighth day of September, 1850, swamp and overflowed land, and by virtue of the act of Congress of that date, entitled "An act to enable the state of Arkansas and other states to reclaim the swamp-lands within their limits," the title to this tract passed from the United States to the state of California, and that it was out of the power of Congress, or of the United States government, in any way or mode, to divest this title so passed to the state by the act of 1850.

It must be regarded as settled beyond controversy that the first section of the swamp-land act (act of September 28, 1850) is a grant *in præsenti* to each state of the swamp and overflowed lands within its limits. The supreme court of the United States, speaking through Justice Field, have said of this act, in *Wright* v. *Roseberry,* 121 U. S. 486: "The words of the first section of the act 'shall be and are hereby granted' import an immediate transfer of interest, not a promise of transfer in the future."

This construction of the act has been sustained in several cases. (See *Tubbs* v. *Wilhoit,* 73 Cal. 63, and cases there cited, and cases cited in *Wright* v. *Roseberry,* 121 U. S. 486.)

The contention of the defendants is, that they can impeach the patent of plaintiff by showing that the land in suit was on the day of the passage of the swamp-land act of 1850 in fact swamp and overflowed lands. To this contention plaintiff replies that defendants are estopped from making such proof by an authoritative decision of a competent tribunal to the contrary binding on both plaintiff and defendants.

When the defendants offered to defeat the effect of the patent to prove that the land was swamp and overflowed on the twenty-eighth day of September, 1850, the plaintiff met it with proof of what he claimed to be an authoritative decision and adjudication to the contrary, as above stated, and with the objection that by reason of such decision such evidence was incompetent and improper.

The material facts pertaining to this adjudication are as follows: In 1871 a contest arose and was carried on in the United States land-office in Marysville, in the contested case of Willard Hodges and George B. Upham in regard to tract No. 12, township 12 north, range 3 east, to which John McNamara (one of the defendants in this case) and the state of California were parties.

Tract 12 includes the land in suit in this case. Hodges and Upham claimed the whole of this tract 12.

This contest involved the right to a portion of this tract 12 as between Hodges and Upham and John McNamara, and to a portion of the same tract as between Hodges and Upham and the state of California. There were other parties to the contest, but as their claims are not in any way involved in this action, they need not be further referred to. Citations were issued and served on all the parties. McNamara appeared by counsel and with his witnesses. The state of California did not appear, nor did any one appear for it. The register and receiver awarded the land in contest (in suit here) between the claimants Hodges and Upham and the state of California to the former. To John McNamara a portion of tract 12 was awarded as against Hodges and Upham. This last-named portion awarded to McNamara is not included in the land sued for in this action.

This decision, as between Hodges and Upham and the state of California, does not seem to have been carried by appeal to the commissioner of the general land-office at Washington. The decision of the register and receiver remains unchallenged by the state of California, or any one claiming under her.

In a contest with another claimant as to lots 22 and 2 (involved herein), these lots were on appeal awarded by the Secretary of the Interior to Hodges and Upham.

In awarding the lands in suit here to Hodges and Upham, the register and receiver held that their right to purchase the lands was superior to that of the state. As the ruling was not appealed from, it would usually be regarded as concluding the state, and estopping her from any claim to the land in controversy.

But did the register and receiver hold that the land was not swamp and overflowed?

On this point they say, in their opinion: "Contestant, state of California, does not appear to contest the claim

of Hodges and Upham, and no direct testimony was called out as to the alleged swamp and overflowed character of the land in dispute between these parties. The evidence, however, shows that all of said tract No. 12 has for many years been used for ordinary purposes of agriculture, in growing grain and grass for hay and pasturage. And the fact of its adaptability for the cultivation of these staple agricultural products would seem to determine the question as to the character of the land as against the state. At any rate, these circumstances, coupled with the fact that prior to the act of July 23, 1866, and to the state's disposal of the land to purchasers in good faith, the claimants became purchasers in good faith of the grant title to the same, should, in our judgment, conclude the state in the premises."

It is undoubtedly held, in the opinion of the register and receiver, that Hodges and Upham were entitled to the land involved in the contest with the state, under the seventh section of the act of July 23, 1866. As far as regards the land in suit, the decision is binding on the state in so far as the register and receiver have decided on the right of Hodges and Upham (see *Hosmer* v. *Wallace,* 97 U. S. 580), and also binding, in our judgment, on defendants, the McNamaras. In these contests before the officers of the land department as to the right to enter land, the parties to whom it could be awarded on the contest are the proper and necessary parties. In the contest we are considering between Hodges and Upham and the state of California, land could be awarded only to one of these parties. It would not and could not be awarded to a grantee of the state, as in this case to McNamara. The United States authorities in such contests only notice the rights of parties who have a right under the laws of the United States to enter and purchase the land. Any person claiming under the state must prosecute or defend his rights under the state as a party to the contest. Mc-

Namara, claiming under the state in this case, must have defended his right under the state as a claimant, and it was incumbent on him to do so. Therefore it follows that whatever was binding on the state bound McNamara. If, as the result of the contest between Willard Hodges and the state, it had been adjudged that the land was not swamp and overflowed, that would have bound the state, within the rule laid down in *Johnson* v. *Towsley,* 13 Wall. 72, approved and followed in *Hosmer* v. *Wallace,* 47 Cal. 471. (See also *Samson* v. *Smiley,* 13 Wall. 91; *Warren* v. *Van Brunt,* 19 Wall. 653; *Shepley* v. *Cowan,* 91 U. S. 330; *Moore* v. *Robbins,* 96 U. S. 530; *Hosmer* v. *Wallace,* 97 U. S. 580; *Marquez* v. *Frisbie,* 101 U. S. 473.) The determination of the facts in the same contest adjudging the right of Hodges and Upham as against the state to enter and purchase the land in suit is for the same reason binding on McNamara. The estoppel as to the state exists only as to the determination by the officers of matters of fact. Their determination, if free from fraud, and not the result of a fraudulent imposition upon them, is final and conclusive. It is still conclusive, though they may err in judgment as to the weight of testimony, or may decide directly against the evidence, subject to the limitation as to fraud and fraudulent imposition above stated.

It may be remarked that this matter of fraud, or fraudulent imposition, could not be set up in an action at law, as this is. The patent on these grounds must be assailed by a proceeding in equity. Such is the law on this subject. (See *Johnson* v. *Towsley,* 13 Wall. 72, and *Moore* v. *Robbins,* 96 U. S. 530.)

But if the officers of the land department award land to one person which has been granted to another, the courts of law can furnish a remedy. It is not within the power or jurisdiction of the land department to award that to one person which by an act of Congress has been granted to another. The land department cannot

grant land. It is incumbent on the land department, in executing the laws of Congress in relation to the public lands, to award to a party claiming to enter and purchase land such right as the laws of the United States have invested him with in regard to the land he claims; but if the laws have invested another with title by grant to the land to another the decision of the land department awarding it to another is a nullity. No title passes by such decision, though the officers of the land department have decided that he is entitled to it. To decide otherwise would be to hold that the land department can grant land contrary to an act of Congress.

It is argued here on behalf of appellants that the officers of the land department have not decided as a matter of fact that the land in controversy was not swamp and overflowed.

It seems to us that this contention, on a fair consideration and interpretation of the opinion of the register and receiver, is sound and maintainable, and that the decision of the register and receiver awards the land to Hodges and Upham on their claim preferred under the seventh section of the act of July 23, 1866, and regardless of the fact whether the land in contest before them was swamp and overflowed or not. The language of their opinion on the point whether the land is swamp and overflowed or not is indefinite and ambiguous, and such that it cannot be said of it that it determines that the land is not swamp and overflowed. The opinion refers to the evidence, and says of it: "That it would seem to determine the question as to the character of the land as against the state." It does not say (as will be observed on a perusal of it) that the evidence shows the land to be dry land, and not swamp and overflowed, but that it would seem to do so. The opinion, in the next sentence, proceeds: "At any rate, these circumstances, coupled with the fact that prior to the act of July 23, 1866, and to the state's disposal of the land in good

faith," etc., proceeding then to award the land to Hodges and Upham upon this claim under the seventh section of the act of Congress just referred to.

The judgment of the register and receiver is too indefinite in its terms to be regarded as a decision that the land here was not swamp and overflowed.

Under these circumstances it is argued that the defendants have a right to show that the land is swamp and overflowed; that, as such, it vested in the state by the act of the 28th of September, 1850, known as the swamp-land act, and that having so vested, it could not be divested, and the title conferred on another, by the subsequent act of July 23, 1866.

Did the swamp-land act of 1850 grant the swamp and overflowed lands within the exterior bounds of a grant, which were excluded on the final survey, to the state of California? This is a question of interpretation of the provisions of the act of 1850, considered in the light of and influenced by the nature of the grants made by the Mexican authorities in California. Was it the intention of the law-makers to grant to the state lands of the nature and character above mentioned? The question is one relating to the intent of the law-making power.

We are of opinion that there was no such intent to grant by the act referred to. The reasons for this opinion we will proceed to give.

It is the settled law of this state that the grantee of a Mexican grant is entitled to the possession of all the land within the exterior limits of the tract designated in the map or diseno (which generally attended the application for a grant), though the quantity intended to be allotted to him on the final survey is a much less quantity than that designated in the map or diseno, and this right continues until the final survey has been made and approved, and perhaps until the patent is issued; or to express the rule more briefly, where the grant is of a smaller quantity (say three leagues) within

a larger area (say of ten leagues), from which the three leagues are to be taken, that the grantee is entitled to the possession of the whole until the quantity (three leagues) to be allotted to him is set off by the final survey, and that he (the grantee) is entitled to recover possession of the whole ten leagues by action appropriate to that end, until the specific quantity granted him is set off.

The above is the rule declared in *Ferris* v. *Coover,* 10 Cal. 621, followed in numerous cases to the same effect. (*Cornwall* v. *Culver,* 16 Cal. 429; *Riley* v. *Heisch,* 18 Cal. 198; *Mahoney* v. *Van Winkle,* 21 Cal. 552.) The same rule has been approved and declared to be the law by the supreme court of the United States in *Van Reynegan* v. *Bolton,* 95 U. S. 35, 36.) We insert here that portion of the opinion (by Field, J.) which relates to this point as a clear exposition of the rule and the reasons on which it rests: "In the case at bar the surveyor-general for California disregarded the boundaries established upon the juridical possession delivered to the grantee. He proceeded upon the conclusion that the confirmees were restricted by the decree to one square league, to be measured out of the tract within those boundaries, which exceeded that amount by about fifteen hundred acres. Whether the terms of the decree justified his conclusion is a question upon which it is unnecessary for us to express an opinion. That is a question which must, in the first instance, be determined by the land department in carrying the decree into execution by a survey and patent. It is sufficient for the present case that the survey made was contested by the confirmees, and the contest was undetermined when this action was tried. Until finally proved, the survey could not impair their right to the possession of the entire tract as delivered by the former government to the grantee under whom they claim. Until then, it was inoperative for any purpose. Even if the limitation to one square league

should ultimately be held correct, that square league might be located in a different portion of the tract by direction of the land department, to which the supervision and correction of surveys of private land claims are intrusted. The confirmees could not measure off the quantity for themselves, and thus legally segregate it from the balance of the tract. The right to make the segregation rested exclusively with the government, and could only be exercised by its officers. Until they acted and effected the segregation, the confirmees were interested in preserving the entire tract from waste and injury, and in improving it; for until then they could not know what part might be assigned to them. Until then, no third person could interfere with their right to the possession of the whole. No third person could be permitted to determine, in advance of such segregation, that any particular locality would fall within the surplus, and thereby justify his intrusion upon it and its detention from them. If one person could in this way appropriate a particular parcel to himself, all persons could do so; and thus the confirmees would soon be stripped of the land which was intended by the government as a donation to its grantee, whose interests they have acquired, for the benefit of parties who were never in its contemplation. If the law were otherwise than as stated, the confirmees would find their possessions limited, first in one direction, and then in another, each intruder asserting that the parcel occupied by him fell within the surplus, until in the end they would be excluded from the entire tract."

The right of possession is property, and full protection of it was guaranteed to the Mexican grantee by the treaty of Guadaloupe Hidalgo, and by the constitution and laws of the United States. (*Ferris* v. *Coover,* 10 Cal. 620, 621.)

That the tract of land involved in this case was within the limits of the grant to Sutter was conclusively

determined against defendants in the proceeding in the land-office, considered in a former part of this opinion, where the land in suit was awarded to Hodges and Upham under the seventh section of the act of Congress of July 23, 1866. When the swamp-land act of the 28th of September, 1850, was passed, Sutter had a right to possession of the land sued for, and it is not to be supposed that the Congress of the United States would grant land to one when another person had to it a right of possession for an indefinite period, guaranteed to him by its laws at the time the grant is said to have been made. It cannot be presumed that Congress would have granted directly and unconditionally to a person a tract of land of which the United States did not have the absolute and uncontrolled title, so that its grantee might a once take possession. It could not be predicated of such a grant as the swamp-land act that Congress intended to grant land to the state when at the time of the grant Sutter had title to possession of the land, and might become invested with the full, legal title. He would have been so invested if, on the final survey of his grant, the land in suit had been included in such final survey. The principle here invoked and relied on was adopted by the United States supreme court in *Leavenworth etc. R. R. Co.* v. *United States,* 92 U. S. 733, where it was held that a grant of land to the state of Kansas to aid in the construction of a railroad embraced only the land whereto the complete title was in the United States at the date of the act, and was applicable only to public lands owned absolutely by the United States. This was held in regard to a grant of land to the state of Kansas, where, at the time the grant was made, the land in question was included in a reservation made to the Osage tribe of Indians.

We think the rule of construction laid down in the case just cited shows that it was not the intention of Congress to grant to the state of California by the act of

September 28, 1850, lands the right to the possession of which was then vested in a Mexican grantee, and guaranteed to him by a treaty as well as by the constitution and laws of the United States.

We see nothing in *Newhall* v. *Sanger,* 92 U. S. 761, or *United States* v. *McLaughlin,* 127 U. S. 452–457, in conflict with anything ruled herein. We cannot see that these cases have any direct application to the case under consideration.

From the foregoing it follows that the judgment and order are without error, and must be affirmed.

There is some very significant evidence in the record in relation to the land in suit, upon which we will make some observations in its relation to the legislation of Congress in regard to swamp and overflowed lands.

The fourth section of the act of July 23, 1866, is in these words:—

"Sec. 4. And be it further enacted, that in all cases where township surveys have been or shall hereafter be made under the authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the general land-office to certify over to the state of California as swamp and overflowed all the lands represented as such, upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats. The commissioner shall direct the United States surveyor-general for the state of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said state; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward to the general land-office for approval; *provided,* that in segregating large bodies of land notoriously and obviously swamp and overflowed it shall not be necessary to subdivide the same, but to run the exterior lines of

such body of land. In case such state surveys are found not to be in accordance with the system of United States surveys, and in such townships as no survey has been made by the United States, the commissioner shall direct the surveyor-general to make segregation surveys, upon application to said surveyor-general by the governor of said state, within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the general land-office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain. If the authorities of said state shall claim as swamp and overflowed any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant, September 28, 1850, and the right to the same, shall be determined by testimony, to be taken before the surveyor-general, who shall decide the same, subject to the approval of the commissioner of the general land-office."

The record shows that the plaintiff offered in evidence the approved official township plat of township 13 north, range 3 east, Mount Diablo meridian, filed in the United States land-office at Marysville, in this state, on August 2, 1869, and also the approved diagram of amendments to said plat from the office of the surveyor-general of the United States for the state of California, dated the 6th of September, 1869, filed in the United States land-office above mentioned, of the land district in which the land in controversy is situated, on September 9, 1869, showing the public lands and claims with specific boundaries within the rejected limits of the New Helvetia rancho. The above plat and diagram include the land involved herein, which is designated thereon as lands claimed by purchasers of Merican grantees, or their assignees, and which have been excluded from the final survey of the Sutter grant.

It will be observed that the land involved in this suit was not represented on the approved plat, or the approved diagram of amendments to it, as swamp and overflowed, and it therefore did not become the duty of the commissioner of the general land-office, under the fourth section of the act of 1866, above quoted, to certify such land over to the state. Nor does it appear in the record that any township plat has been constructed which represents such land to be swamp and overflowed.

Under the provisions of the fourth section it will be seen that the governor of the state was vested with authority to have the swamp and overflowed lands segregated by survey on application to the surveyor-general, and it was further provided, in the same section, that if the authorities of the state shall claim as swamp and overflowed any land not represented as such upon the map, or in the returns of the surveyors, the character of such land at the date of the grant (September 28, 1850), and the right to the same, shall be determined by testimony, to be taken before the surveyor-general, who shall decide the same, subject to the approval of the commissioner of the general land-office.

In this case no steps have been taken by the governor or the state authorities to have the character of this land determined,—to have it decided whether it was swamp and overflowed at the date of the grant. Nor does it appear that the defendants have even taken steps to have the governor or state authorities move in the matter. The patent under which the plaintiff makes title was issued on the 16th of December, 1882, on a claim commencing as far back as 1850. Defendants claim that their claim rested on a certificate of purchase issued on the 21st of July, 1856. The delay in this matter to have the character of the land determined, as could have been done under the section of the act of 1866, above quoted, though not conclusive, is strongly persuasive that the

land was never of the character described by the swamp-land act of 1850 as swamp and overflowed.

The court did not err in refusing to allow defendants to prove that the lands in suit belonged to the category of swamp and overflowed lands.

We find no error in the record, and the judgment and order are affirmed.

MCFARLAND, J., WORKS, J., and SHARPSTEIN, J., concurred.

PATERSON, J., concurring.—I concur in the judgment. The swamp-land grant of 1850 is one *in præsenti,* and passed the title to the lands as of its date, but it could not attach to any specific tract until it was determined by the proper officer that the land was swamp in character. Under the act of 1850 it was the duty of the Secretary of the Interior to make out accurate lists and plats, and transmit the same to the governor of the state, and at the request of the latter, cause patents to issue therefor. No provision was made for a review of his action in ascertaining and designating the character of the lands. Under the act of July 23, 1866, which was passed to quiet land titles in California, the duty of identifying swamp-lands by survey and segregation was put upon the surveyor-general, subject to the approval of the land commissioner. It was provided that a hearing might be had by the state before the surveyor-general, for the purpose of showing that the township plats were incorrect. Provision was also made for the adjustment of the claims of *bona fide* purchasers from Mexican grantees, where the land purchased had been excluded from the survey of the grant on its final confirmation. These contests were heard before the register and receiver of the local land-office, under certain rules formulated by the commission.

On August 2, 1869, the land in controversy was returned and designated upon the official plat as public

land claimed by purchasers of Mexican grantees, or their assigns. It was not returned as swamp-land, and was not designated on the official plat with the usual government sections and subdivisions, but in accordance with existing lines of subdivisions, so as to include "permanent improvements," as provided by section 7 of the act of July 23, 1866. This plat, which, in effect, showed that the land was not regarded by the surveyor-general as swamp and overflowed land, remained on file in the local land-office from August, 1869, to June, 1888, without challenge by any one—the state or its grantees—as to the character of the land. Hodges and Upham filed in the local land-office, in September, 1869, a pre-emption claim for the land under section 7 of the act of 1866, claiming to have purchased it for a valuable consideration from the Mexican grantees, and placed valuable improvements thereon in part only. On this statement citations were issued by the officers of the land-office to the defendant, who had filed on a portion of the tract described in the Hodges claim, and to the state, to show cause against the application of Hodges and Upham to purchase. The state did not appear, but the defendant herein appeared and contested the application. An appeal was taken to the commissioner of the general land-office, and from his decision to the Secretary of the Interior, who finally determined that the applicants were entitled to a patent.

I think the proceedings had on application of plaintiff's grantors, who purchased the land under the provisions of the seventh section of the act of July 23, 1866, and the decision rendered by the department, are a complete bar to any claim of the state, and to the claim of the defendants. It is true, the proceedings against McNamara involved other lands than those in controversy here, but they also involved the right of said grantors to purchase the lands in controversy as against all parties to that action. At the time those proceedings were pending

McNamara held a certificate of purchase under which he now claims title to the lands in suit. Although that certificate was issued in 1860, and the hearing before the land-office was not had until March, 1871, yet I think McNamara's right was concluded therein. The application of Hodges and Upham was based upon the allegation that they were *bona fide* purchasers for a valuable consideration from Mexican grantees of land which had been excluded from the final survey of the grant; that they had made improvements and occupied the land according to the lines of their original purchase, and that there was no valid adverse right except that of the United States. In accordance with the rules of the department the said McNamara and all other persons interested were duly cited to appear and contest their right to purchase the land under the act of July 23, 1866. The defendant did appear and contest the claimant's right to a portion of the land, but made no contest as to that portion which is in controversy here, and for which he at that time held a certificate of purchase. The state had parted with her title to the defendant, and was interested in the contest. It was the duty of McNamara, as grantee of the state, to defend whatever claim he had under his certificate. It seems to me that, in the absence of fraud, the decision of the land department was binding on all the parties and all the world. (*Wright* v. *Roseberry,* 121 U. S. 488; *French* v. *Fyan,* 93 U. S. 169.)

The defendants did not offer to show that the land was swamp and overflowed at the time the grant took effect, to wit, September 28, 1850. The evidence offered was all addressed to the question as to its character at the time of the trial. The court did not err, therefore, in excluding the evidence.

[No. 13936. In Bank.—January 4, 1891.]

D. M. VANCE, PETITIONER, *v.* SUPERIOR COURT OF SACRAMENTO COUNTY, AND J. W. ARMSTRONG, JUDGE, RESPONDENT.

EXCEPTIONS—PETITION TO SUPREME COURT—CONSTRUCTION OF CODE.—Section 652 of the Code of Civil Procedure, providing for a petition to the supreme court to prove an exception which the judge has refused to allow in accordance with the facts, has no application, except where the judge has refused to allow an exception which he had the power to allow.

ID.—SETTLEMENT OF FACTS.—If an exception has been disallowed contrary to the facts, the party may prove to the supreme court that the exception was taken, and in connection therewith may prove sufficient surrounding facts to show the point of the exception; but if no exception has been disallowed, a petition will not lie to the supreme court merely to determine whether the judge has inserted or refused to insert a correct statement of the proceedings and evidence in the action.

PETITION to the Supreme Court to strike out amendments to a bill of exceptions and to settle the same. The facts are stated in the opinion of the court.

Amos H. Carpenter, for Petitioner.

A. L. Rhodes, and *Wilson & Wilson,* for Respondent.

MCFARLAND, J.—This proceeding is in the form of an original petition to this court, in which it is stated, substantially, that the petitioner, Vance, was a defendant in a certain action in the court of respondent; that judgment having been rendered against him in said action, he presented to the respondent, judge of said court, a draught of a bill of exceptions which, it is averred, contained a true statement of the proceedings and evidence in said action; that the said judge changed said draught by striking out certain things from its statement of said proceedings and evidence, and inserting certain other things therein, and settled said bill as so amended by him; and that the amendments made by said judge were incorrect and untrue. The prayer of the petition

is, that this court "will allow and settle said bill of exceptions as set forth in the printed pages of this petition." The printed pages of the petition contain the entire draught of the bill of exceptions, which purports to state all the proceedings and evidence in the action referred to, and the written part shows the amendments made by the judge before the settlement. The amendments do not appear to us to be material, and yet they may have some importance which does not appear here.

If this proceeding can be maintained at all it must be by virtue of section 652 of the Code of Civil Procedure. The language of that section is as follows: "If the judge in any case *refuse to allow an exception* in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same." Now, it seems quite apparent, upon the face of this language, that the petition must be based upon the refusal of the judge to allow an exception which is "an objection upon a matter of law to a decision made . . . . by a court, tribunal, judge, or other judicial officer" (Code Civil Proc., sec. 646); but in the petition now before us there is no averment or showing or pretense that the respondent refused to allow any exception whatever, or that the proceedings or evidence about which the dispute occurs had any reference whatever to any exception which he refused to allow. The petitioner therefore clearly fails to bring himself within the language of the section. It is argued, however, by petitioner, as it has been argued by counsel in other recent cases, that there should be no "narrow" construction given to section 652, but that this court should construe it to extend to every imaginable case where, in a statement on motion for a new trial, or (which is practically the same thing) in a long bill of exceptions covering the whole trial, there is a dispute between the attorney and the presiding judge as to what evidence had been introduced, or what in other respects had occurred at the trial. This

is an attempt, without warrant in the canons of construction, to assume that the legislature meant more than it said. No interpretation can be justly called "narrow" which follows statutory language, which is itself *ex industria* narrow. When section 652 was enacted the statutory general law—in accordance with the inherent distinction between trial and appellate courts—was, that the judge of the trial court alone should make that record, which otherwise would not be record, by settling statements and bills of exceptions, and that the appellate court should act upon records as they came to it.

If the legislature had intended to entirely overturn that ancient rule, and to send the appellate down into the trial court to construct for the latter an entire history of a trial there, it certainly would not have confined itself to the "narrow" language which it employs. But it evidently approached the subject with the greatest caution. It said nothing about statements on motion for new trial, or about what evidence, or what history of proceedings generally, should go into statements or general bills of exceptions, nor did it undertake to give this court general power to reconstruct such statements or bills, or determine what evidence should go into or be stricken out of them. It refers solely to a case where the judge is charged with having refused to allow an exception; that is, where a party claims that he made "an objection upon a matter of law to a decision made" by the court, and took an exception to the decision, and the court refuses to certify, in a bill or statement, that such an exception was taken, or that such an occurrence took place. In such a case, the party may prove, if he is able, in this court, that he did take such exception, and may prove, no doubt, in that connection, sufficient surrounding facts to show what the point of the exception it. If he succeed in making his proof, his exception will be here put into a bill, certified by this court through its chief justice, and filed with the clerk below, where it will take

its place among the other things which constitute the record. But when the code speaks of an exception which the judge has refused to allow, it necessarily refers to an exception which the judge had the power to allow, and section 652 has no application, except where a judge has refused to allow such an exception. If it be an evil that a statement of what evidence was introduced, made by a judge who presided over the trial, and who acts in his judicial character and under his judicial oath, cannot be overcome by the contradictory statement of somebody else, why, it must be put into the large class of evils (real or imaginary) which this court has no jurisdiction to remedy. These views are in accordance with *Landers* v. *Landers,* 82 Cal. 480. They are also expressly held in the recent case of *Hyde* v. *Boyle,* 86 Cal. 352, although in the latter case it does not appear that the opinion was concurred in by a majority of the court. And for the reasons above stated, the application in the case at bar must be dismissed.

It may be noticed that counsel for respondent raises here, for the first time, the point that section 652 is unconstitutional, for the reason that by it the legislature undertook to confer upon this court powers, and to impose upon it duties, not embraced in any of the categories of jurisdiction enumerated in that part of the constitution by which this court is created. But as the case is already disposed of, we do not care to consider the constitutional question at this time.

The prayer of the petition is denied, and the proceeding dismissed.

WORKS, J., and SHARPSTEIN, J., concurred.

PATERSON, J., concurred in the order.

[No. 13894. In Bank.—January 4, 1891.]

W. A. KIRKWOOD, RESPONDENT, *v.* A. J. SOTO, APPELLANT.

CONSTITUTIONAL LAW—OFFICERS—INCREASE OF SALARY—INCIDENTAL EXPENSES.—Section 9 of article 11 of the constitution, forbidding the compensation of any county, city, town, or municipal officer from being increased after his election or during his term of office, only applies to the compensation for services to be rendered, and does not forbid an allowance for the incidental expenses of the office, to be determined by the necessity which the business of the office may develop.

ID.—COUNTY GOVERNMENT ACT—AMENDMENT OF POLITICAL CODE—TRAVELING EXPENSES OF COUNTY SUPERINTENDENT OF SCHOOLS.—The County Government Act fixing a salary for county superintendents of schools "as compensation for the services required of them by law, or by virtue of their office," does not prevent the application of the amendment of section 1552 of the Political Code, made in March, 1889, allowing each county superintendent his traveling expenses, and other incidental expenses connected with the office, to a county superintendent holding office at the time of the amendment

APPEAL from a judgment of the Superior Court of Contra Costa County.

The facts are stated in the opinion.

W. S. Tinning, for Appellant.

Chase, Chase & Miller, for Respondent.

BELCHER, C. C.—The respondent was elected superintendent of schools for Contra Costa County at the general election held in 1886. His term was four years, commencing on the first Monday of January following. In due time he qualified and entered upon the discharge of his duties, and has ever since continued to hold the office.

At the time of his election, Contra Costa was a county of the seventeenth class, and the County Government Act contained the following provision in regard to his salary:—

"Sec. 179. In counties of the seventeenth class, the county officers shall receive as compensation for the

services required of them by law, or by virtue of their office, the following salaries, to wit: . . . . 11. The superintendent of school, eighteen hundred dollars per annum." (Stats. 1885, p. 176.)

In March, 1889, section 1552 of the Political Code was amended so as to read as follows:—

"Sec. 1552. Each county superintendent shall receive his actual and necessary traveling expenses, said expenses to be allowed by the board of supervisors, and to be paid out of the county general fund; provided, that this amount shall not exceed ten dollars per district per annum. He shall also be allowed postage and expressage, payable out of the county school fund, two dollars for each school district; provided, that in incorporated cities each school containing three hundred pupils shall be considered equal to one school district."

After this amended section took effect the respondent incurred, in the performance of his official duties as school superintendent in visiting schools in his county, actual and necessary traveling expenses to the amount of $76.75. For this amount he presented a claim to the board of supervisors, properly itemized and verified, for allowance. The claim was examined and allowed by the board, and a warrant was ordered drawn on the county treasurer therefor. The appellant was county auditor at the time, and, as such, refused to draw the warrant ordered, and thereupon this proceeding was commenced to compel him to do so.

After a hearing, the court below granted the prayer of the petition, and ordered a peremptory writ of mandate to issue, commanding the appellant to forthwith draw his warrant in favor of the petitioner upon the county treasurer for the amount allowed and ordered paid by the board of supervisors. From that order or judgment this appeal is prosecuted.

The only contention of appellant is, that section 1552 of the Political Code is inapplicable and unconstitutional,

so far as the respondent is concerned, it having been passed after he was elected to office, because, in authorizing the payment of his necessary traveling expenses, it in effect increases the compensation or salary allowed him at the time of his election.

The clause of the constitution relied upon reads as follows: "The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office." (Art. 11, sec. 9.)

The words "compensation" and "salary" were evidently used synonymously in the constitution, and in the County Government Act. Thus in article 5, section 19, of the constitution, it is provided: "The governor, lieutenant-governor, secretary of state, controller, treasurer, attorney-general, and surveyor-general shall, at stated times during their continuance in office, receive for their services a compensation which shall not be increased or diminished during the term for which they shall have been elected," etc.

In article 9, section 2, it is provided: "A superintendent of public instruction shall, at each gubernatorial election after the adoption of this constitution, be elected by the qualified electors of the state. He shall receive a salary equal to that of the secretary of state," etc. And in article 6, section 17, this language is used: "The justices of the supreme court and judges of the superior court shall severally, at stated times during their continuance in office, receive for their services a compensation which shall not be increased or diminished after their election, nor during the term for which they shall have been elected. The salaries of the justices of the supreme court shall be paid by the state. One half of the salary of each superior court judge shall be paid by the state; the other half thereof shall be paid by the county for which he is elected. During the term of the first judges elected under this constitution, the annual salaries of the justices of the supreme court shall be six

thousand dollars each." In the County Government Act the same language is used at the commencement of each section which fixes the compensation of county officers. It is: "The county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries."

Since the adoption of the present constitution many acts have been passed by the legislature, after the commencement of terms of office, providing for the payment of necessary expenses incident to the offices. Among them the following may be noted:—

The justices of the supreme court and the judges of the superior court who were first elected under the constitution entered upon the discharge of their duties as such on the first Monday of January, 1880. In April following, an act was passed to amend part 1 of the Code of Civil Procedure, and substituting a new part 1, to take the place thereof. (See Amendments to Code, 1880, p. 21.) By section 47 of this act it was provided that the supreme court shall hold regular sessions at the capital of the state, at the city and county of San Francisco, and at the city of Los Angeles; and that "the justices and officers of the supreme court shall be allowed their actual traveling expenses in going to and from their respective places of residence upon the business of the court, or to attend its session." By section 71 it is provided that a judge of any superior court may hold the superior court in any county at the request of the judge of that county, "and upon the request of the governor, it shall be his duty to do so." And by section 160 it is provided that "a judge so holding a court at the request of the governor shall be allowed his actual expenses in going to, returning from, and attending upon the business of such court, which shall be a charge against the treasury of the county where such court is held, and paid out of the general fund thereof."

The constitutionality of these provisions has never

been questioned, so far as we are advised, in any court, or elsewhere, and yet, if the theory of the appellant be true, they would seem to have been subject to the same objections raised here, during the terms of the justices and judges who were in office at the time the act was passed.

The question now presented for decision does not appear to have been ever passed upon by the supreme court of this state, but a similar question was before the supreme court of Illinois in *Briscoe* v. *Clark County,* 95 Ill. 309.

The constitution of that state provided that the county board should fix the compensation of all county officers, with the amount of their necessary expenses, "provided that the compensation of no officer shall be increased or diminished during his term of office." The supreme court held that it was the salary of the county officer—the compensation for the personal discharge of official duty —which the board was forbidden to change. The compensation or salary was to be fixed in advance, but the expenses were to be determined by the *necessity* which the business of the office should develop, and being so, the allowance for expenses could be increased.

In our opinion, it was the compensation for services to be rendered, and not the incidental expenses of the office, that the legislature was forbidden by section 9 of article 11 of the constitution to raise.

We therefore advise that the judgment appealed from be affirmed.

FOOTE, C., and GIBSON, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

[No. 13363. In Bank.—January 4, 1891.]

E. G. SUKEFORTH, RESPONDENT, v. GEORGE LORD, APPELLANT.

PLEADING — FRAUD — GENERAL ALLEGATION—WAIVER—APPEAL—OBJECTION FOR FIRST TIME.—Where an answer alleges fraud in general terms, and the plaintiff goes to trial upon the issue without objection to the pleading, or to the evidence of fraud, all objection is waived, and it cannot be urged upon appeal for the first time that there was no issue of fraud by reason of the failure of the answer to allege the particular facts constituting the fraud.

ID.—JUSTIFICATION OF ATTACHMENT—FRAUDULENT TRANSFER—DEMURRER—WAIVER.—The answer of a sheriff in an action for damages for seizing goods claimed by the plaintiff, under a writ of attachment against his vendor, which denies the plaintiff's title, and pleads in general terms that the sale to him was pretended, false, and fraudulent, and made with the purpose and intent to hinder, delay, and defraud his creditors, is demurrable on account of the general allegation of fraud; but a failure to demur to the answer, or object to the evidence of the fraud, is a waiver of the objection.

ID.—FAILURE TO OBJECT TO EVIDENCE—NEW-TRIAL STATEMENT.—Where the party pleading fraud generally moves for a new trial, and the statement fully sets out the evidence of fraud, and specifies sufficiently that the verdict is against that evidence, the fact that no objection to the evidence of fraud appears in the statement is sufficient proof that none was made at the trial.

ID.—BENEFIT OF WAIVER—APPEAL BY PARTY PLEADING FRAUD GENERALLY.—The fact that the verdict was against the party alleging the fraud in general terms is not ground for denying him, on appeal, the benefit of the waiver by the prevailing party of the insufficiency of the allegations of fraud.

EXCEPTION TO INSTRUCTIONS — ENTRY OF EXCEPTION.—Where the record shows that counsel for the defendant, as the jurors were retiring, asked to have an exception entered to all the instructions given at the request of the plaintiff and on the court's own motion, and to all instructions refused upon the request of the defendant, to which request the court assented, a sufficient exception is shown as to the written requests to charge given and refused, though not to oral charge of the court; and the fact that no exception was in fact entered in the minutes of the court, nor in the reporter's notes of the trial, is immaterial.

FRAUDULENT TRANSFER—INSTRUCTIONS.—Where facts are established from which the jury would be justified in inferring fraud in the transfer of goods to the plaintiff, though the inference may not be absolutely necessary, the defendant is entitled to have the issue of fraud submitted to the jury upon instructions fully and fairly stating the law applicable to a fraudulent transfer.

ID.—VALUE OF GOODS—ADMISSION OF PLEADINGS—ERRONEOUS INSTRUCTION.—Where the pleadings admit the value of the goods seized by the defendant, an instruction authorizing the jury to find a less value is erroneous, though perhaps not sufficient ground for a reversal.

ID.—PREFERENCE OF CREDITOR—GOOD FAITH.—Instructions to the effect that a transfer of property by a debtor to one creditor in preference to others is not necesarily fraudulent, although not positively erroneous, should be qualified by the statement that the transfer must be made in good faith.

ID.—FRAUD IN LAW—CONSCIOUSNESS OF WRONG.—It is error to refuse an instruction that a man is guilty of fraud in doing what the law deems fraudulent, although he may not be conscious that he is committing any wrong.

ID.—FRAUDULENT INTENT—TRANSFER TO CREDITOR IN EXCESS OF DEMAND.—The acceptance by a creditor from an insolvent debtor of an amount of property largely in excess of his demand is a circumstance tending to prove a fraudulent intent, and a refusal to so instruct the jury is erroneous.

ID.—AGREEMENT TO REFUND SURPLUS.—An agreement between an insolvent debtor and a creditor, to whom he transferred all his property, that the creditor would refund the surplus proceeds, is a circumstance tending to show that the transfer was made with intent to delay and defraud creditors, and it is error to refuse an instruction to that effect.

ID.—EVIDENCE OF AGREEMENT.—The fact that the value of the property so transferred is grossly in excess of the creditor's claim is a circumstance tending to show that such an understanding exists, and the jury should be so instructed.

ID.—CIRCUMSTANTIAL EVIDENCE.—Where the evidence of the alleged fraud is circumstantial and presumptive, it is error to refuse a correct instruction as to the necessity in most cases of relying upon such evidence to prove fraud, and as to the amount of proof required to establish it satisfactorily.

APPEAL from a judgment of the Superior Court of Nevada County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

George A. Rankin, and *T. C. Coogan,* for Appellant.

P. F. Simonds, and *Cross & Denson,* for Respondent.

BEATTY, C. J.—This is an action to recover damages on account of the seizure by defendant, under a writ of attachment, of certain goods claimed by the plaintiff. The case arose under the following circumstances: On

the 15th of August, 1888, L. M. Sukeforth, who for a number of years theretofore had carried on a certain carpet business at Nevada City, being largely indebted and insolvent, sold, transferred, and delivered to the plaintiff, who is his brother, for a nominal consideration of fifteen hundred dollars, his entire stock in trade, all his outstanding bills and accounts, and all other property exempt from execution which he then possessed. Among his creditors at the time of this transfer were Sloan & Co., wholesale carpet dealers, who caused a suit to be instituted upon their claim, and in said suit caused an attachment to be issued, which was levied by the defendant, as sheriff of Nevada County, on the stock of carpets, etc., then in the possession of the plaintiff, and claimed by him as vendee of his brother. Thereupon this action was commenced against the sheriff, who defends upon the ground that the sale from L. M. Sukeforth to the plaintiff was fraudulent and void as to creditors.

The case was tried by a jury, who found for the plaintiff, and the defendant appeals from the judgment, and from an order denying his motion for a new trial.

At the trial in the superior court, all questions of fact were eliminated from the case by the mutual admissions of counsel, except the single one of fraud in the sale, and all the assignments of error which we are asked to consider relate exclusively to that matter.

A preliminary objection is made by the respondent to any consideration of the errors assigned, upon the ground that the answer of the defendant was insufficient to raise the issue of fraud.

The allegations of the answer upon this point are as follows: "That the defendant is informed and believes, and upon such information and belief so avers the fact to be, that on or about the said fifteenth day of August, 1888, while said L. M. Sukeforth was so as aforesaid engaged in business, and while he was so as aforesaid indebted, he,

said L. M. Sukeforth, and the plaintiff, who is his brother, conspired together for the purpose and with the intent to hinder, delay, and defraud the creditors of said L. M. Sukeforth out of their just debts and demands against him, said L. M. Sukeforth; and with such purpose and intent the said L. M. Sukeforth made a pretended, false, and fraudulent sale of the property mentioned in plaintiff's complaint, and of all other property, save such as is by law exempt from execution, owned by said L. M. Sukeforth, to the plaintiff, and with such purpose and intent the said plaintiff received said pretended false and fraudulent conveyance, and thereupon said plaintiff took possession of said property and so held the same, and not otherwise."

If there had been a demurrer to the answer, it would probably be held, on the authority of *Pehrson* v. *Hewitt,* 79 Cal. 598, and other cases cited by respondent, that these allegations were insufficient as a plea of fraud. Or if evidence tending to prove the supposed fraud had been objected to at the trial upon the ground of immateriality, the objection would probably have been sustained unless the answer had been amended.

But there was no demurrer to the answer, and at the trial evidence was offered and admitted, without any objection whatever, which tended in the strongest manner to establish every fact necessary to invalidate the sale on the ground of fraud.

The question, therefore, is, whether a party who has treated an answer containing a general allegation of fraud as sufficient to raise the issue, by going into a trial of all the questions involved, without any objection, can make the point here for the first time that there is no such issue in the case.

We think there can be no manner of doubt that if the verdict and judgment in this case had been in favor of the defendant, and the plaintiff had been appealing, he would not have been heard to allege the defect in the

answer, which he relies on here to prevent a consideration of the errors assigned by the defendant.

In *King* v. *Davis,* 34 Cal. 106, the plaintiffs were appealing, and in this court objected to the answer, on precisely the ground taken by the respondent here. But the court said: "The point made by the appellant, that the answer does not make an issue of fraud, cannot be considered by us further than to say that it comes too late. The answer contains a general allegation of fraud, and the appellant went to trial upon the issue thus joined without making any exception to the answer on the score of insufficiency. Nor was any objection made by the appellant to the testimony introduced by the respondent in support of the issue of fraud. On the contrary, that issue was assumed to have been properly made, and was tried upon its merits. Under these circumstances, an objection to the answer that it does not contain a statement of the particular facts and circumstances constituting the alleged fraud cannot be entertained by us."

The proposition, that the failure to allege the particular facts constituting fraud, or estoppel, or other special defenses pleaded in general terms, may be waived by failure to demur or to object to the evidence offered at the trial has been affirmed over and over again in a long series of cases running through our reports, from the first volume down to the case of *Hughes* v. *Wheeler,* 76 Cal. 230.

We refer to the following, among many others: *Lee* v. *Figg,* 37 Cal. 335; *Hutchings* v. *Castle,* 48 Cal. 155; *Bull* v. *Ford,* 66 Cal. 176.

Against this long list of cases is cited the recent decision of Department One of this court, in *Albertoli* v. *Branham,* 80 Cal. 633, which is supposed to establish a different doctrine.

If that case could not be distinguished from this, it would be sufficient to say that it is not law. A decision

of one Department of this court cannot be held to have overruled a long line of cases decided by the whole court, especially when they are not even named or otherwise referred to in the Department decision, and were evidently not considered.

But the truth is, that case differed from this, and from the cases above cited, in the important particular that the evidence of fraud was objected to at the trial (though the report does not show it). By reason of this fact, probably, counsel for defendant did not make the point that there had been any waiver of defects in his plea of fraud, and did not cite any of the cases holding the doctrine above quoted from *King* v. *Davis,* 34 Cal. 106. His whole contention was, that his plea was sufficient, and that was the only question which the Department decided. Therefore the rule of *King* v. *Davis,* 34 Cal. 106, is still unquestionably the law of this state, as it unquestionably ought to be.

But the respondent contends that it does not apply to this case, because,—1. The answer was in such form that he could not have demurred to it on any ground allowed by the statute, and therefore he waived nothing by failure to demur; 2. The record does not show that he failed to object to evidence of fraud; 3. The defect in the plea was not cured by verdict, as in *King* v. *Davis,* 34 Cal. 106, and other cases in which the verdict was in favor of and not against the plea, as it is in this case.

With respect to the first point, respondent says the plea of fraud was not separately stated, but was coupled with a denial of plaintiff's ownership, which made the answer good against the general demurrer to the whole answer, and a demurrer to the plea of fraud impracticable. We think, however, that the plea of fraud is separately stated in the answer, and might have been separately demurred to. But if it was not separately stated, it must be regarded as qualifying the denial in general terms of plaintiff's ownership, and showing that such denial meant

nothing more than that the plaintiff was not the owner of the goods, because the transfer from L. M. Sukeforth was void as to creditors, by reason of fraud. In which case —assuming that the fraud was insufficiently pleaded— the whole answer was demurrable, on the ground that it did not state facts sufficient to constitute a defense, or that it was ambiguous, uncertain, and unintelligible. (Code Civ. Proc., sec. 444.)

As to the second point. It is true, as contended by respondent, that there is no express statement in the record to the effect that he failed to object to the evidence of fraud; but we do not deem such an express statement necessary, if the fact can be clearly inferred from the statement, as we think it can. The defendant, in moving for a new trial, specified in his statement the particular grounds upon which he relied, and every specification of fact or law showed that he relied upon having proved every fact necessary to establish a fraudulent sale. He also set out the evidence to sustain his specifications, all appearing to have been received without any objection upon the ground that fraud had not been pleaded. If any such objection had been made, it was the right of the respondent to amend the proposed statement so as to show it, and undoubtedly he would have done so. The fact, therefore, that no objection appears to have been made is proof that there was none. To hold otherwise, would destroy all the advantage of the doctrine of waiver; for in all cases where the party had not been warned of the defects of his plea by demurrer or objection to evidence, he would be wholly unaware of the necessity of making it appear by his statement or bill of exceptions that he had not been warned, and the court would merely have saved him from one snare in order to involve him in another.

As to the third ground for denying the defendant the benefit of the doctrine of waiver, we think that the fact that he is appealing is rather in his favor than otherwise.

In *King* v. *Davis,* 34 Cal. 106, as in all the cases in which the plaintiff was appealing, the only consequence of a reversal of the judgment on account of the insufficiency of the plea would have been a retrial of the cause upon amended pleadings; but to affirm the judgment on that ground when the defendant is appealing would leave him without remedy or hope of redress. Therefore, when he is appealing in a meritorious case in which he might prevail on a new trial under correct rulings, it would be even more unjust to allow plaintiff to object to his plea in this court for the first time than it would have been to allow the objection in the cases cited.

For these reasons, we conclude that the defendant is entitled to have his appeal considered on its merits.

His first proposition is, that the evidence showed without substantial conflict that the transfer of the property in controversy by L. M. Sukeforth to plaintiff was fraudulent and void as to creditors, and that the superior court erred in not granting a new trial on that ground.

It is certain that many facts were established, without any conflict in the evidence, from which the jury would have been justified in inferring a fraudulent intent upon the part of plaintiff and his brother in making and accepting the transfer; but we are not willing to say that such inference was absolutely necessary. It is, however, certain that the case was such as entitled the defendant to have the issue of fraud submitted to the jury upon instructions fully and fairly stating the law applicable thereto.

This, we think, was not done, the court having given instructions that should have been refused or qualified, and refused instructions that should have been given. But here, again, we are met with the technical objection that the errors of the court in giving and refusing instructions cannot be reviewed, because they were not excepted to in time, or at all.

The objection is based upon the following statement in the record:—

"After the officer had been sworn to take charge of the jury, and as the jurors were retiring, but before they were out of the court-room, counsel for the defendant stepped up to the side of the bench, and said to the court: 'I would like an exception entered to all the instructions given by the court at the request of the plaintiff, to all the instructions asked by the defendant and refused by the court, and to all instructions given by the court on its own motion.'

"The court said: 'Have any exceptions entered you desire.'

"Counsel said: 'Shall I have the clerk enter them?'

"The court replied: 'If you choose to do so.'

"Neither the minutes of the court kept by the clerk, nor the reporter's notes of the trial, show that any exception to instructions was reserved or entered."

This shows very clearly that a sufficient exception was taken to the written requests to charge given and refused (*McCreery* v. *Everding,* 44 Cal. 249; *Shea* v. *P. & B. V. R. R. Co.,* 44 Cal. 429), though it was probably insufficient as an exception to the oral charge of the court. (*Rider* v. *Edgar,* 54 Cal. 130, and cases there cited.) We will therefore consider only the exceptions to the written charges.

It was error to give plaintiff's instruction No. 15, which was as follows: "If you find a verdict for the plaintiff in this case, your verdict will be for the value of the property converted by the defendant at the time of the conversion, not exceeding the sum of four thousand dollars, together with interest thereon from August 25, 1888, to this date, at the rate of seven per cent per annum."

The property taken by defendant was alleged in the complaint and admitted by the answer to be worth four thousand dollars, and a verdict for the plaintiff could not

properly have been rendered for less than four thousand dollars and interest. Under this instruction, the jury were allowed to find, and they did find, a verdict for less than four thousand dollars.

This does not look like an injury to the defendant, but he complains that he was injured by the instruction, in this way: If the jury had been compelled to find for the plaintiff for four thousand dollars or not at all, they would have found for defendant; but being allowed to find a smaller verdict for plaintiff, they eased their consciences by a sort of compromise between what they wished and what the law demanded. We scarcely think that this would have been a ground for reversal, but as the case is to be remanded for a new trial on other grounds, and as the defendant deems himself injured by this instruction, we feel constrained to pronounce it erroneous.

It cannot, perhaps, be said that the first, eleventh, and thirteenth instructions, asked by plaintiff, are positively erroneous. They are all to the effect that a transfer of property by a debtor to one creditor, in preference to others, is not necessarily fraudulent. It would have been better, however, in view of the facts of this case, to have added the qualification that such transfer must be made in good faith.

The instructions asked by defendant, and numbered 4, 6, 11, and 16, were all correct and pertinent, and the refusal to give them was error, and error clearly prejudicial to the defendant.

By the first (No. 4), the defendant sought to impress upon the jury the view that a man is guilty of fraud in doing what the law deems fraudulent, although he may not be conscious that he is committing any wrong. By the second (No. 6), the court was asked to instruct the jury that the acceptance by a creditor from an insolvent debtor of an amount of property largely in excess of his demand is a circumstance tending to prove

a fraudulent intent. By the third (No. 11), the court was asked to charge as follows: "If a debtor who is insolvent transfers to one of his creditors all his property except such as is exempt from execution, with an understanding or agreement between himself and his creditor that the latter will dispose of the property so transferred, and after paying himself, refund whatever remains to the debtor, such an understanding or agreement would be a circumstance tending to show that the transfer was made with the intent to delay and defraud creditors; and where the value of the property so transferred is grossly in excess of the creditor's claim, that is a circumstance tending to show that such an understanding exists."

The fourth (No. 16) contains a correct statement as to the necessity in most cases of relying upon circumstantial or presumptive evidence to prove fraud, and of the amount of proof required to establish it satisfactorily.

From the character of the evidence in this case, it was important that the jury should be correctly informed on all these points, and for the error in refusing these instructions, the judgment and order appealed from must be reversed.

We see no error in the other rulings complained of.

Judgment and order reversed, and cause remanded.

McFARLAND, J., PATERSON, J., and SHARPSTEIN, J., concurred.

[No. 12510. In Bank.—January 4, 1891.]

DON F. MILLER, APPELLANT, v. ELIZABETH WADE ET AL., RESPONDENTS.

NONSUIT—BILL OF EXCEPTIONS—SPECIFICATIONS OF ERROR—APPEAL.—On an appeal from a judgment of nonsuit, the ruling of the court in granting the nonsuit cannot be reviewed unless the bill of exceptions assigns or specifies the ruling of the court as error.

ID.—REVIEW OF EVIDENCE—TIME FOR APPEAL—CONSTRUCTION OF CODE.—The ruling on a motion for a nonsuit is a "decision," within the meaning of section 939 of the Code of Civil Procedure, and as the whole question depends upon the sufficiency of the evidence to sustain the decision of the trial court upon the motion, the appeal must be taken within sixty days, to be available for a review of the ruling.

ID.—REVIEW OF JUDGMENT OF NONSUIT—GROUNDS OF MOTION—WAIVER.—Where a nonsuit is granted, the decision of the trial court will be upheld, if the ruling can be justified on any ground, whether made a ground of the motion or not, and the fact that the record does not show the grounds upon which the motion was made, or that any grounds were assigned, will not justify a reversal of the judgment of nonsuit.

ID.—WAIVER OF GROUNDS OF MOTION.—An appellant whose motion for nonsuit is denied must show that he pointed out to the court below the grounds of his motion, and any ground not there urged is waived; but this rule can have no application where the decision is in favor of the moving party.

APPEAL from a judgment of the Superior Court of Alameda County granting a motion for a nonsuit.

The facts are stated in the opinion of the court.

W. W. Allen, and *D. L. Smoot,* for Appellant.

George F. Hoeffer, and *Moore & Reed,* for Respondents.

WORK, J.—This is an appeal by the plaintiff from a judgment of nonsuit. There is a bill of exceptions, which contains the evidence, and from which it appears that a nonsuit was granted; but the ruling of the court is not assigned or specified as error. Such an assignment has been held to be necessary to present the question to this court. (*Schroeder* v. *Schmidt,* 74 Cal. 459; see also *Polack* v. *Gurnee,* 66 Cal. 267; *Malone* v. *County of Del Norte,* 77 Cal. 217.)

The assignment of error is the pleading which points out the particular question raised and passed upon in the court below, and presented to this court for review. The bill of exceptions is intended to present the facts and the exception which sustains the point made, and thus reserved for our determination. (*Pico* v. *Cohn,* 78 Cal. 385.) If this were not so, this court would be compelled, instead of looking to the assignment of errors for the questions presented, to search the whole transcript to find them; opposing counsel would have no means of knowing what points would be relied upon, until the briefs were filed in this court, and questions could be urged here that had never been called to the attention of the court below on a motion for a new trial. A different rule was declared in one case, in Department, in which a distinction is made between a statement and a bill of exceptions in this respect. (*Shadburn* v. *Daly,* 76 Cal. 355.) It is true, as said in that case, that the statute applies, in terms, to statements only, but this court has held, in a number of cases, that a statement and a bill of exceptions are the same; and where a bill of exceptions is used on a motion for a new trial, and is thereby made to take the place of the statement, it must contain everything necessary to present the question by a statement. Undoubtedly a bill of exceptions might be used where a statement might not be proper, and in many cases no specification of error would be necessary. But where a bill of exceptions is used as the basis of a motion for a new trial, it is a statement. The court below has a right under the code to have specifically pointed out all errors relied upon in making the motion, and this court can only be called upon to pass upon such questions as have thus been specified and relied upon in the trial court.

That such was the intention of the code we have no doubt, and it is absolutely necessary that it should be so, in order that cases may be fairly presented and properly decided. The same rule must prevail in any case where

the error to be reviewed depends upon the evidence given at the trial, whether it is necessary to present the error complained of by a motion for a new trial or not. The policy of the law is, that a question should be presented to the court below, and an opportunity be given to that court to correct the error, if one has been committed, before appealing to this court.

It is further contended by the respondent, that as the determination of the question whether or not the nonsuit was properly granted depends entirely upon the sufficiency of the evidence to make out the plaintiff's case, the appeal must have been taken within sixty days, and as this appeal was not taken within that time, it was too late.

Section 939 of the Code of Civil Procedure provides: "But an exception to the *decision* or verdict, on the ground that it is *not supported by the evidence,* cannot be reviewed on an appeal from the judgment, *unless the appeal is taken within sixty days* after the rendition of the judgment."

We think the ruling on the motion for a nonsuit was a *decision* within the meaning of this section, and although the ruling, if erroneous, has been held to be an error of law, the whole question depends, in this court, upon the sufficiency of the evidence to sustain the decision of the trial court. The appeal must be taken within sixty days to be available.

The appellant contends that the judgment of nonsuit cannot be upheld in this case, because the record does not show the grounds upon which the motion was made, or that any grounds were assigned. This would be so if the nonsuit had been denied, and the defendant had appealed. But it is not so where the nonsuit was granted. The decision of the trial court will be upheld where the nonsuit is granted, if the ruling can be justified on any ground, whether made a ground of the motion or not. The reason for this is, that the moving party must show error on appeal, and in order to sustain an appeal in this

class of cases, he must show that he pointed out to the court below the grounds of his motion.

If he did not, the objection is waived. But this rule cannot apply where the motion is granted, as the doctrine of waiver can have no application where the decision is in favor of the moving party.

But notwithstanding our conclusion that the question is not properly presented, we have examined the evidence carefully, and are satisfied that the evidence of the plaintiff was entirely insufficient to make out his case, or to put the defendant upon her proof.

Judgment affirmed.

SHARPSTEIN, J., and FOX, J., concurred.

PATERSON, J., and MCFARLAND, J.—We concur in the judgment on the ground last stated. The decision of the Department in *Shadburn* v. *Daly*, 76 Cal. 355, is correct, in our opinion, and should be adhered to.

DE HAVEN, J., and THORNTON, J., dissented.

[No. 13578. In Bank.—January 4, 1891.]

JANE ANN CLAVEY, ADMINISTRATRIX, ETC., ET AL., APPELLANTS, *v.* JOSEPH LORD, RESPONDENT.

APPEAL—REVIEW OF EVIDENCE—CREDIBILITY OF WITNESSES—FINDING RENDERED IMMATERIAL.—The findings of the court below will not be disturbed upon appeal, when there is evidence to support them, and nothing appears in the record to show that the court did not justly estimate the credibility of the witnesses; nor will a particular finding be disturbed, if other findings, justified by the evidence, render the issue immaterial.

VERDICT IN EQUITY CASE—POWER OF COURT.—The verdict in an equity case is only advisory to the court until adopted, and the court may of its own motion disregard it and set it aside.

DELAY IN SETTING ASIDE VERDICT — WAIVER OF OBJECTION.—The fact that no action was taken by the court in respect to the verdict for three months after it was rendered, and after each party had moved for judgment upon it, is no

objection to the action of the court in then disregarding it, and hearing additional evidence, it not appearing what was the cause of the delay, or that any objection thereto was urged by the appellants.

ID.—OPENING CASE FOR FURTHER EVIDENCE — DISCRETION.—It is within the discretion of the court to permit further evidence, when it sets aside the verdict in an equity case; and if both parties are permitted to introduce additional evidence without any apparent restriction, and there is no showing of surprise, or of want of opportunity to produce any additional available evidence, no abuse of discretion appears.

LIMITS OF DISCRETIONARY POWER—ABUSE OF DISCRETION.—Discretionary judicial power may be exercised either way, and the only limitation upon its exercise is, that it must not be abused; and while it may be difficult to define what is meant by abuse of judicial discretion, one of its essential attributes is, that it must plainly appear to effect injustice.

EVIDENCE—IMPEACHMENT OF WITNESS—CONTRADICTORY STATEMENT AFTER TESTIMONY GIVEN — INSUFFICIENT OBJECTION. — The question of the admissibility of evidence offered for the impeachment of a witness, by showing that *after* his testimony was given he had made contradictory statements, is not raised by an objection that no proper foundation had been laid for impeachment, if the objection was expressly limited to evidence of *prior* contradictory statements.

ID.—IMMATERIAL EVIDENCE — HARMLESS ERROR—APPEAL.—Where evidence, admitted against objection, relates only to an issue which is rendered immaterial by the evidence and findings upon other issues, which are decisive of the case, any error in its admission is harmless, and is not ground for reversal of the judgment.

APPEAL from a judgment of the Superior Court of Tuolumne County, and from an order denying a new trial.

The facts are stated in the opinion.

James H. Budd, and *F. D. & G. W. Nicol,* for Appellant.

F. W. Street, E. A. Rodgers, and *J. C. Campbell,* for Respondent.

VANCLIEF, C.—The first count of the complaint in this action alleges that the decedent, in his lifetime, verbally contracted with the defendant to deliver to the latter a large number of stock cattle, which the defendant was to herd, pasture, feed, and care for, in consideration of which the defendant was to have one half of the increase of said cattle, but was to return or account to the

decedent for all the cattle originally delivered, and one half the increase, at the expiration of the contract. The contract did not fix or state the time during which the defendant was to keep the cattle, but it is alleged that he kept them until William Clavey died,—June 25, 1885. Nor is the date of the contract alleged, but it appears that it was made in 1875.

It is further alleged, on information and belief, that the deceased delivered to the defendant, under the contract, "about 140 head of stock cattle," which defendant kept, according to the contract, and "that the increase of said cattle, while in possession of the defendant under said contract, amounted to many hundreds."

It is further alleged, on information and belief, that during the lifetime of William Clavey, there was no accounting between him and defendant in regard to the cattle, and that no accounting or settlement has been made between plaintiffs and defendant in regard to the cattle since the death of William Clavey.

In the second count it is alleged, on information and belief, that during the lifetime of the deceased, he and defendant entered into a verbal contract, "by the terms of which they were to purchase large tracts of land in Tuolumne County, the same to be held by them in common"; that under said contract, "Clavey furnished to defendant large sums of money with which to purchase and pay for his (Clavey's) interest in the aforesaid land," and that defendant, "with said money, and money of his own, and under said agreement, did purchase large tracts of land, the deeds and conveyances of which were taken in the name of defendant, and in trust, however, for the joint benefit of himself and said Clavey, each of whom owned an undivided half thereof"; that the defendant still holds the title to said lands, and "refuses to account to plaintiffs therefor, or for the rents and profits of the land, or for the money invested therein by Clavey, and refuses to make any statement of his trust under

said contract, all of which has been demanded by plaintiffs."

The prayer of the complaint is: 1. That defendant account for the cattle under the contract first alleged; and 2. That he account for all money received by him for the purchase of land under the contract, alleged in the second count, and for all lands purchased therewith, and for the rents and profits thereof.

The answer of the defendant admits a contract in regard to the cattle, but with the additional terms that the defendant was authorized to deal with, sell, and dispose of the cattle and the increase, as his own, during the time he should keep them, and account to Clavey for the proceeds of such sales, and that defendant was not to be liable for loss of cattle by death or otherwise; and also that defendant was to hold said cattle as security for all debts due the defendant from Clavey; and denies that Clavey delivered to defendant more than seventy-seven head of cattle under the contract; denies that there had been no accounting and settlement with Clavey and the defendant; but alleges that at divers times he had accounted to and settled with Clavey, during his lifetime, for all matters pertaining to the cattle contract, and that in March, 1887, he had accounted and settled with the plaintiffs for all the cattle and increase thereof that remained in his possession after the death of Clavey.

The answer also denies all the material allegations of the second count.

Twenty-five special issues, framed by counsel for the respective parties, were submitted by the court to a jury, and on April 7, 1888, the jury returned a verdict in favor of the plaintiffs upon all the issues except one, as to which the jury failed to agree.

Thereupon each party asked for judgment on the special verdict; but no further action appears to have been taken by court or counsel until July 14, 1888, when defendant's counsel asked permission to introduce further evidence.

which was allowed by the court against the objection of plaintiffs' counsel.

After hearing the additional evidence, the court set aside the special verdict, and upon all the evidence made written findings in favor of the defendant, and rendered judgment accordingly.

The plaintiffs appeal from the judgment, and from an order denying their motion for a new trial.

The court found the cattle contract to have been as stated in defendant's answer, and that defendant received only seventy-seven head of cattle under the contract, and further found, in regard to the cattle transaction, as follows:—

"6. That during the lifetime of said Clavey, defendant and said Clavey had frequent settlements and accountings in regard to the cattle so received, and the increase thereof, and that at each of said settlements defendant fully settled with said Clavey for all of the cattle sold, and the increase of said cattle;

"7. That on or about the 10th day of March, 1887, defendant delivered to plaintiffs herein, the administratrix and administrator of the estate of the said William Clavey, deceased, all of the cattle that remained in defendant's possession, whether the same were original stock cattle or the increase of said stock cattle, and the plaintiffs herein received the same;

"8. That at the time of the commencement of this action, defendant did not have in his possession any of the original stock cattle received from William Clavey, nor any of the increase of the original stock cattle so received, nor any of the proceeds of the sale of said cattle or the increase thereof, but had fully accounted to said Clavey during his lifetime for the increase of said cattle, and the proceeds from the sale of the same, and had turned over to said plaintiffs all of the cattle that they were entitled to receive under the terms of said contract."

Upon all the issues in the second count, the court found in favor of defendant.

1. Many of the findings are attacked on the ground that they are not justified by the evidence. But I think all the findings, except that as to the number of cattle delivered to defendant under the contract, are sustained by a preponderance of evidence; and the findings as to the number of cattle delivered is supported by the positive testimony of the defendant and of the witness Richards, opposed to the positive testimony of John Loney and the rather indefinite testimony of McFarland for the plaintiffs. There was an attempt by each party to discredit the witnesses of the other as to the number of cattle; but there is nothing in the record from which it can be seen or determined here that the court did not justly estimate the credibility of the witnesses. Besides, if the sixth, seventh, and eighth findings, as to settlements with the deceased and plaintiffs, are justified by the evidence, as I think they are, they are controlling, and render the issue as to the number of cattle immaterial.

2. It is insisted by appellants that the court erred in hearing additional evidence three months after the verdict of the jury was rendered, and in disregarding the verdict of the jury.

When the verdict was rendered, each party moved for judgment upon it, and it does not appear why the court did not further act in the case until three months thereafter; yet it does not appear that the delay was objected to by the appellants.

If the court disagreed with the verdict of the jury, there should be no question that it had the power to disregard and set it aside of its own motion, since, until adopted by the court, it was only advisory. (*Johnson* v. *Powers,* 65 Cal. 179; *Sweetser* v. *Dobbins,* 65 Cal. 529; and other cases.)

The only remaining question under this head is, whether the court erred in permitting the defendant to introduce

further evidence without showing cause therefor by affidavit.

It was undoubtedly within the discretionary power of the court to permit further evidence, under the circumstances disclosed by the record. (*Foote* v. *Richmond,* 42 Cal. 441; *Barry* v. *Bennett,* 45 Cal. 80; *Keys* v. *Warner,* 45 Cal. 60; *Abbey Homestead Ass'n* v. *Willard,* 48 Cal. 615; *Cousins* v. *Partridge,* 79 Cal. 224; *First Nat. Bank* v. *Wolff,* 79 Cal. 70.) And no abuse of that power appears. Both parties were permitted to introduce additional evidence without any apparent restriction, and both parties did introduce additional evidence. There is no complaint that the plaintiffs were surprised, or were not allowed ample opportunity to procure and introduce evidence in rebuttal or in chief, nor does it appear that plaintiffs failed to procure any additional evidence desired which would have been available under other circumstances.

Conceding that the court might have denied the motion to admit further evidence without any apparent abuse of discretion, as in the case of *Kohler* v. *Wells, Fargo & Co.,* 26 Cal. 613, cited by respondent, it does not necessarily follow that it was an abuse of discretion to grant the motion; for in cases where the decision is governed entirely by the discretion of the court, it may often happen that a decision in favor of either party would not appear to be an abuse of discretion. To say that the law allows no latitude for the exercise of discretionary power, is to deny that the power is discretionary. The only limitation that the law has placed upon the exercise of discretionary judicial power is, that it must not be abused. While it may be difficult to define exactly what is meant by abuse of judicial discretion, and whatever it may imply as to the disposition and motives of the judge, it is fairly deducible from the cases that one of its essential attributes is, that it must plainly appear to effect injustice.

3. On the trial before the jury, McFarland testified for the plaintiff as to the number of cattle delivered to

the defendant. On the trial before the court three months later, the defendant offered to prove by his witness Preston that after McFarland had testified, he made a statement, in regard to the number of cattle, inconsistent with his testimony before the jury. Thereupon the following objection by counsel, and ruling by the court, were made:—

Mr. Nicol.—"I object, upon the ground that no proper foundation has been laid to impeach his testimony."

Mr. Budd.—"If it was not after he had testified, he cannot be impeached in that way."

Mr. Campbell.—"It was after."

The Court.—"Answer the question."

Mr. Budd.—"Plaintiff excepts."

The witness then testified to a statement by McFarland, made after he had testified before the jury, inconsistent with his testimony before the jury.

Counsel for appellants contend that the admission of Preston's testimony was error.

I think, however, that the objection as modified by Mr. Budd, who appears to have been the leading counsel for plaintiffs, was no objection to proving what McFarland said *after* he testified before the jury; and the objection must have been so understood by the court and counsel for defendant.

4. The deposition of J. W. Tullock, assessor of Stanislaus County, was offered in evidence by defendant, to show how many cattle were assessed to Clavey in 1874. The plaintiffs objected to questions numbered 7, 8, 9, 10, and 11. Their objection was sustained as to 9 and 10, but was overruled as to 7, 8, and 11. Those questions were as follows:—

"No. 7. State whether or not the assessment-list of that year contains certain cattle belonging to the said Clavey.

"No. 8. State just what the assessment-book shows with reference to these cattle, with regard to number, value, and quality."

"No. 11. State whether or not the 124 head of cattle above referred to include all the cattle which were assessed to William Clavey in 1874."

The answers to these questions appear to have been read by the witness from page 22 of the assessment roll of 1874, showing that 124 head of cattle, and no more, had been assessed to Clavey that year, and that "124 head of stock cattle had been removed to Tuolumne County."

The grounds of the objections were, that No. 7 was incompetent, irrelevant, and not the best evidence; the same as to No. 8, and also that it does not appear who made the assessment, or that Clavey signed or had anything to do with it, and that No. 11 did not ask for the best evidence.

It is claimed by appellants' counsel, that the court erred in overruling their objections to the questions numbered 7, 8, and 11.

If there was error in any of these rulings, it was harmless. The evidence objected to tended to prove only that Clavey owned no more than 124 head of cattle at the time of the assessment in 1874, and therefore could not have been applied to any other issue than that as to the number of cattle delivered to defendant. It had no bearing whatever upon the issues as to settlements, and could not have influenced or contributed to the findings upon these issues. These findings are controlling, and dispose of the case in favor of the respondent, without regard to the number of cattle delivered.

5. Several other exceptions to rulings of the court were taken, but they appear to be either grounded upon misapprehension of the facts, or unimportant in view of the settlements found.

I think the judgment and order should be affirmed.

FOOTE, C., and HAYNE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No.13816. In Bank.—January 4, 1891.]

E. S. CHESTER, APPELLANT, *v.* EDWARD FIELD ET AL., RESPONDENTS.

EJECTMENT—QUIETING TITLE—JUDGMENT ON PLEADINGS.—When a complaint contains the usual allegations in ejectment, and all that are necessary to quiet title, and prays that defendants be required to set forth their claims, and that they be adjudged invalid, that plaintiff be restored to possession, and defendants be debarred from asserting any claim to the land, and for other and further relief, and the answer denies plaintiff's alleged right of possession, a motion for judgment on the pleadings is not proper, though the denial may be subject to a special demurrer; and the court could not, in view of the allegations and prayer of the complaint, give judgment without evidence, even if no answer had been filed.

APPEAL from a judgment of the Superior Court of Calaveras County.

The facts are stated in the opinion of the court.

A. Everett Ball, for Appellant.

Henry C. Dibble, for Respondents.

PATERSON, J.—The complaint contains the usual allegations in ejectment, and all that are necessary to quiet title. At the trial, and before any evidence was introduced, the plaintiff moved for judgment on the pleadings, claiming that the answer raised no material issue. There was no demurrer to the answer.

The motion was properly denied. If the action be considered as an action of ejectment, there is a specific denial of plaintiff's alleged right of possession. It may be that the denial is too general, and that it would not stand the test on demurrer for uncertainty, but it is sufficient to raise an issue as to some portion of the property and to defeat a motion for judgment on the pleadings, assuming that such a motion would be good under any circumstances in an action of ejectment.

The prayer of the complaint is, that the defendants be

required to set forth their claims; that said claims be adjudged to be invalid, and plaintiff's title declared to be good; that plaintiff be restored to possession, and defendants be debarred forever from asserting any claim to the land, and "for such other and further relief as shall be meet in the premises, and costs of suit."

Upon the allegations of the complaint and this prayer the court would not have given judgment without evidence, if there had been on answer filed.

The judgment is affirmed.

McFarland, J., Works, J., and Thornton, J., concurred.

[No. 20705. In Bank.—January 4, 1891.]

Ex Parte AH SING, on Habeas Corpus.

Habeas Corpus—Jurisdiction of Police Court—Convictions of Misdemeanor — Complaint — Time of Offense.—The police court has jurisdiction to try and convict a defendant charged with misdemeanor, although the time of the commission of the offense is not set forth in the complaint.

Application to the Supreme Court for discharge on writ of *habeas corpus*. The facts are stated in the opinion of the court.

Joseph F. Coffey, for Petitioner.

The Court.—Application to be discharged on *habeas corpus*.

The petitioner, as appears by the return, is in custody of the sheriff of the city and county of San Francisco, by virtue of a commitment upon a conviction by the police court of the city and county aforesaid of a misdemeanor, viz., visiting a gambling-place.

It is urged that the court below was without jurisdiction, because the time was not set forth in the complaint upon which the conviction was had.

This point might have been considered and passed on by the court which rendered the judgment, and might also have been considered and passed on by the superior court, to which the case was carried by appeal of the defendant, and the judgment there affirmed.

We cannot see that the court below was without jurisdiction for the defect claimed which is brought to our attention.

[No. 13687. Department One.—January 5, 1891.]

T. F. JOYCE, RESPONDENT, *v.* WING YET LUNG, APPELLANT.

ORDER—VERBAL ACCEPTANCE—EVIDENCE.—A written order given by a debtor to his creditor for the amount of his indebtedness, addressed to a person indebted to the drawer in a like sum, and verbally accepted and partly paid by the drawee, is admissible in evidence, together with proof of the verbal acceptance, in an action by the payee to recover the remainder of the indebtedness from the drawee.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

L. F. Fisher, and *C. C. Stephens,* for Appellant.

R. Dunnigan, for Respondent.

DE HAVEN, J.—The findings show that Wing Yet Lung was on March 27, 1888, indebted to the firm of Joyce & Duncan in the sum of $643.30, and that firm being also indebted to the respondent in the same amount, they upon that day gave an order requesting the appellant to pay respondent the sum of $643.30. Said order was accepted by appellant, and he paid thereon the sum of $300. Judgment was rendered against appellant for the balance of $343.30, and his motion for a new trial denied.

Appellant's acceptance of the order drawn against him by the firm of Joyce & Duncan was only verbal, and upon the trial he objected to the admission of the evidence showing such verbal acceptance, and also to the introduction of the order itself, upon the ground that such acceptance, not being in writing, was not binding, and that the order itself was incompetent evidence without a written acceptance, and these objections, being overruled, are assigned as error.

The court did not err in overruling appellant's objection to this evidence. (*Wheatley* v. *Strobe,* 12 Cal. 92.)

The evidence is sufficient to support the findings, and we find no error in the record.

Judgment and order affirmed.

GAROUTTE, J., and PATERSON, J., concurred.

[No. 14026. Department Two.—January 5, 1891.]

AUGUSTE SCHRAMM ET AL., RESPONDENTS, *v.* SOUTHERN PACIFIC COMPANY, APPELLANT.

ORDER GRANTING NEW TRIAL—REVIEW ON APPEAL—DISCRETION.—An order granting a new trial will be reversed as readily as an order refusing it, when it is granted solely through a misapprehension of law; but if the grounds of the motion are numerous, and include insufficiency of the evidence, and other grounds upon which the discretion of the court might be exercised, and the order is in general terms, and no clear abuse of discretion appears, the order will be affirmed.

APPEAL from an order of the Superior Court of Los Angeles County granting a new trial.

The facts are stated in the opinion of the court.

John D. Bicknell, for Appellant.

Pepper & Lindenfield, and *E. C. Bower,* for Respondents.

McFARLAND, J.—This is an action brought by the widow and children of John Schramm, deceased, to recover damages for his death, which is alleged to have occurred on the railroad track of defendant, and to have been caused by the negligence of defendant and its employees. The jury returned a verdict for defendant, and the court below granted a new trial. From the order granting plaintiffs' motion for a new trial, defendant appeals.

Orders of trial courts granting new trials are not often disturbed, and yet when it appears that such an order was granted through misapprehension of the law, it should be reversed as readily as an order refusing a new trial. But in the case at bar it is impossible to know the reasons upon which the order was based. The grounds of the motion were numerous, including alleged errors in ruling upon the admissibility of evidence and upon instructions to the jury, insufficiency of the evidence to justify the verdict, and that it is against law, and misconduct and irregularity in the proceedngs of the court and jury. The order of the court merely grants the motion in general terms. If it could be said that the motion rested entirely on supposed errors in giving or refusing instructions to the jury, it might be well urged that the order should be reversed, for there were certainly no errors committed in that regard against the plaintiffs. They were as favorable (if not more so) to plaintiffs as they could have been reasonably expected under the law as established in this state upon the subjects embraced in the instructions; and if there was any error committed on this point there was none of which plaintiffs should complain, and we see no other errors of law sufficient to warrant a new trial. But if the court granted the motion on the ground of insufficiency of evidence to justify the verdict (as it may have done), we are not prepared to say that in so doing it grossly abused its discretion. Moreover, the point as

to the irregularity of the proceedings may have had weight with the court. A number of written instructions which had been asked and refused, and had been indorsed by the judge "Not given," went to the jury with those that were given. This, of course, was irregular and wrong; but such an irreularity would not always warrant a court in setting aside a verdict, for it might appear that it probably did no harm. In the case at bar, however, the court might have thought that harm was done. For instance, there was a contested issue of fact whether or not there was a "crossing" at the place where the accident occurred; and on an instruction referring to that matter the judge had indorsed, "Not given; not shown to be a crossing." And the judge may have thought that this, and also the refusal of other instructions, might have been taken by the jury as the expression of his opinion on questions of fact. He is presumed to have been better acquainted with the whole case than this court, and to have known better what might have influenced the jury. While, therefore, upon the case as we see it, we may not be very strongly impressed with the conviction that it was the duty of the court below to set aside the verdict, still we do not feel it to be our duty to set aside the order of the court. That course is rarely taken here, except when the questions raised involve issues of law alone.

Order appealed from affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 13891. Department Two.—January 5, 1891.]

W. E. CAMPBELL, RESPONDENT, *v.* CHARLES THOMAS, APPELLANT.

REAL ESTATE AGENT — CONTRACT FOR COMPENSATION — RESERVOIR SITE — POSSESSORY RIGHT — AFTER-ACQUIRED TITLE — SALE BY PRINCIPAL.—A written contract to pay to an agent for the sale of a reservoir dam site a certain share of the purchase price, whether the sale should be effected by the agent or by the principal, is not defeated or affected by the fact that the principal had only a possessory title to the site at the date of the contract, and thereafter procured the legal title thereto, and sold it as land.

APPEAL from a judgment of the Superior Court of San Bernardino County.

The facts are stated in the opinion of the court.

Waters & Gird, for Appellant.

Willis, Cole & Craig, E. E. Rowell, and *Paris & Fox,* for Respondent.

McFARLAND, J.—This is an action to recover two fifths of the amount for which certain property was sold by defendant. The court gave judgment for plaintiff for $1,850.80, and defendant appeals.

The defendant and other persons entered into a written contract with plaintiff by which plaintiff was appointed their agent to negotiate a sale of a certain reservoir dam site situated on the San Jacinto River, in San Diego County, and in which they agreed that if plaintiff effected a sale to be approved by them, they would give him two fifths of the purchase price, and that if they themselves made a sale without consulting plantiff, he was to have the same percentage as though he had effected the sale. While this contract was still in force, and plaintiff was still their agent, they effected a sale without consulting him, and on that sale defendant re-

ceived property of the value of $4,627, for two fifths of which the judgment was rendered.

At the trial, a great many exceptions were taken which are not referred to in appellant's brief, and which do not seem to present any material error. The real point insisted on by appellant is, that the property sold was not the property mentioned in the contract. The facts on which this point rests are these: At the time of the contract, defendant did not have the legal title to the reservoir dam site, but only a possessory title. He had posted notices claiming the site, and also certain water rights, and claimed to be in possession. This site was on section 7, and was consequently railroad land. He told plaintiff that he had made arrangements with the railroad land agent, and that as soon as the land was graded and in the market, he would get title from the railroad company. Afterwards such title was procured, and although in the sale the property was described as so much land, it was the same land that constituted the reservoir dam site described in the contract, and was bought by the purchasers, Judson, Potts, and Mayberry, for the express purpose of a reservoir dam site,—for which purpose it was mainly valuable. The facts, therefore, that a better title was procured after the making of he contract, and that the property was described in the sale as land, do not defeat the contract. It is clear that the property mentioned in the contract, and the property sold, was the same.

Judgment and order denying a new trial affirmed.

SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 14017. Department Two.—January 5, 1891.]

GEORGE MILLER, RESPONDENT, *v.* THE HIGHLAND DITCH COMPANY ET AL., APPELLANTS.

SEVERAL TORTS—COMMON INJURY—DAMAGES—JOINT ACTION.—Several tort-feasors, not acting in concert or by unity of design, are not liable to a joint action for damages, although the consequences of the several torts have united to produce an injury to the plaintiff.

ID.—INJUNCTION.—An injunction will be sustained in such case against all the tort-feasors.

ID.—DITCHES—DEBRIS—INJUNCTION—JOINT JUDGMENT FOR DAMAGES.—Where *débris* is deposited upon the lands of the plaintiff by means of different ditches constructed and operated by several defendants, between whom there was no concert of action, a joint action may be maintained to enjoin them all from continuing the wrong, but a joint judgment for damages in such action is erroneous, and will be reversed.

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Waters & Gird, Curtis & Otis, and *George E. Otis,* for Appellants.

Willis, Cole & Craig, and *Harris & Gregg,* for Respondent.

MCFARLAND, J.—Plaintiff was the owner of a tract of land situated about one mile southerly from the San Bernardino range of mountains. Part of the tract was in a high state of cultivation. Coming out of said mountains, and trending towards plaintiff's land, but not reaching it, is a canon called Baldridge Canon. The natural waters of said canon would not flow upon plaintiff's land, but, as found by the court, "would spread out on the lower lands without cutting any particular channel, the tendency of the flow being to spread out over the said lower lands north of plaintiff's premises and become absorbed in the soil. But the defend-

ants, by means of three different ditches, turned foreign water into said canon, and the commingling water from said ditches passed through said canon, and by cutting new channels, etc., flowed out and over plaintiff's land, covering part of it with sand and *débris,* and thus doing him damage. All of the ditches, however, were not owned jointly by all of the defendants. Each ditch was owned and operated by part only of the defendants, who had no interest in the other ditches, and there was no concert of action—that is, no common design—between the owners of one ditch and the owners of the other ditches. The action was brought to enjoin all the defendants from continuing the wrong, and also to recover damages jointly against all the defendants for the injury already done. The court gave judgment decreeing an injunction, and also adjudging damages against all the defendants jointly for $972.33. Defendants appeal from the judgment, and from an order denying a new trial; and the only point they make is, that the joint judgment for damages is erroneous because there was no concurrent or joint act or negligence on the part of defendants which caused the damage.

It is clear that the rule as established by the general authorities is, that an action at law for damages cannot be maintained against several defendants jointly, when each acted independently of the others, and there was no concert or unity of design between them. It is held that in such a case the tort of each defendant was several when committed, and that it does not become joint because afterwards its consequences united with the consequences of several other torts committed by other persons. If it were otherwise, say the authorities, one defendant, however little he might have contributed to the injury, would be liable for all the damage caused by the wrongful acts of all the other defendants, and he would have no remedy against the latter, because no contribution can be enforced between tort-feasors. (*Chipman* v. *Palmer.*

77 N. Y. 51; *Little Schuylkill Nav. Co.* v. *Richards,* 57 Pa. St. 182; *Sellick* v. *Hall,* 47 Conn. 260; Gould on Waters, sec. 222; Pomeroy on Remedies, secs. 307, 308.) The case of *Blaisdell* v. *Stephens,* 14 Nev. 17, is very similar to the case at bar, and involved the very point under discussion. In that case several defendants were sued "for wrongfully flowing waste water from their lands, to the injury of plaintiff's ditch, and for an injunction to restrain such wrongful flowing of waste water." It appeared, however, that the defendants "own, occupy, and irrigate separate and distinct tracts or parcels of land, each in his own right"; and they moved for a nonsuit upon the ground that it did not appear that the injury complained of "was the result of the joint or concurrent act of defendants." The trial court overruled the motion, and, on appeal, the supreme court of Nevada held that the nonsuit should have been granted, and said in its opinion: "The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they cannot be held jointly liable for the acts of each other." On rehearing, however, it was held that the injunction against defendants was proper; but the judgment, so far as it awarded damages, was reversed.

The principle has not been changed in this state, either by statute or judicial decision. The latest authority on the point here is *People* v. *Gold Run D. & M. Co.,* 66 Cal. 138. That was a case where it was sought, by the equitable remedy of injunction, to restrain the commission of acts similar to those complained of in the case at bar, and the appellant sought to invoke, as against the injunction, the principle above stated as applicable to actions at law for damages. This court held, however, that the rule did not apply to the equitable remedy; but it expressly stated that it would apply to an action for damages. Counsel for appellant, in support of their position, had cited a number of cases; and in alluding to them,

this court said as follows: "Each of those cases was decided upon the principle that where several persons acting independently of each other engage in the commission of wrongful acts, the torts are distinct, and not joint, and each is only severally liable for the injury caused by his own acts, and not for the torts of others with whom he was not acting in concert. There can be no doubt of the correctness of that principle, and of its applicability to an action at law for the recovery of damages for the violation of a private right." It may be contended that the earlier case of *Hillman* v. *Newington,* 57 Cal. 56, established a different doctrine; but it must be remembered that the main purpose of that action was to procure and maintain an injunction. The judgment awarded only nominal damages,—one dollar. Before that time there had been some doubt whether several wrong-doers acting independently could be joined in an equitable proceeding to procure an injunction against all; and indeed it had been once held in this state (*Keys* v. *Little York etc. Co.,* 53 Cal. 724) that it could not be done. The language of the court in *Hillman* v. *Newington,* must therefore be considered as referring especially to the right of equitable remedy. There was practically no question of damages before the court, and no question was raised as to the distinction between the equitable and the legal remedy. The case is referred to in the opinion of the court in the latter case of *People* v. *Gold Run D. & M. Co.,* 66 Cal. 138, above mentioned, where *Hillman* v. *Newington* is evidently considered as settling only the equitable remedy. (And of course the distinction is very plain between holding one defendant liable for the past wrongs of all the others, and simply enjoining all from committing wrong in the future.) We think, therefore, that, under the law as clearly settled, the joint judgment against the defendant for damages is erroneous.

We have considered this case somewhat at length, because it is contended that the rule as above stated will

in some instances work a hardship to owners of property injured by the joint consequences of acts of several persons not acting in concert. No doubt there may be cases where it would be difficult to make sufficient proof against one of such persons if sued separately. But it cannot be made clear that the opposite rule would work less wrong. At all events, we must declare the law as we find it. If the law were changed so that in a case like the one at bar a several judgment could be given against each defendant for the proportionate part of the joint damage which his individual acts had caused, it may be that such change would be in furtherance of justice. But the suggestion of such change could be properly made only to the law-making power.

The judgment appealed from, so far as it awards damages against defendants, is reversed, and in all other respects the judgment is affirmed. Let appellants recover the costs of this appeal.

Order overruling motion for new trial affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 13765. Department Two.—January 5, 1891.]

EZRA CARPENTER, RESPONDENT, *v.* A. R. HATHAWAY, APPELLANT.

CONTRACTS—ORAL AGREEMENT — SUBSEQUENT MEMORANDUM — MERGER.—Where an oral agreement has been made and partially performed, a writing subsequently given as a mere acknowledgment or memorandum thereof, and containing nothing inconsistent therewith, does not operate to merge or supersede an express provision of the oral agreement not included in terms in the memorandum.

ID.—PARTNERSHIP IN LANDS—TIME FOR DIVISION OF PROFITS.—An oral agreement for a partnership in the purchase and sale of lands to be acquired and sold in the name of one partner, with an express provision that the net proceeds of each sale were to be equally divided immediately after the sale, is not merged or superseded as to such provision by a subsequent memorandum, made after certain lands were acquired under it, which consisted of a mere written acknowledgment

by the partner who had acquired the title to the land, that he had acquired it, and that it was understood and agreed that the other partner was to share equally in the net profits of the land, without stating the time of division.

ID.—REFUSAL TO ACCOUNT—ACTION FOR DISSOLUTION AND ACCOUNTING—MATURITY OF CAUSE OF ACTION.—Upon the refusal of the partner holding the legal title to account after a sale by him of part of the partnership lands, an action will lie in favor of the other copartner for a dissolution of the partnership and an accounting of the profits of the land sold, and to establish his interest in all the unsold lands acquired under the verbal agreement.

PARTNERSHIP — ACCOUNTING—PURCHASE OF LAND—INTEREST.—Interest, if not stipulated for in the partnership agreement, cannot be allowed on the purchase-money of the lands bought for the partnership.

ID.—TAXES AND EXPENSES—APPEAL—OBJECTIONS FOR FIRST TIME.—It cannot be objected upon appeal that no allowance was made to the defendant for taxes and necessary expenses incurred in reference to the lands, the net profits of which were to be divided, if no evidence of taxes or expenses was offered nor claim made therefor at the trial.

ID.—DECREE ESTABLISHING INTEREST IN LANDS—FUTURE TAXES—TAXATION.—No provision for future taxes need be made in a decree establishing the plaintiff's interest in the partnership lands, the legal title of which was in the defendant, as the plaintiff's interest is taxable to himself alone, and not to the defendant, after the date of the decree.

APPEAL from a judgment of the Superior Court of San Luis Obispo County, and from an order denying a new trial.

The facts are stated in the opinion.

William Shipsey, for Appellant.

W. B. Dillard, for Respondent.

GIBSON, C.—Plaintiff brought this action to dissolve a partnership, for an accounting, and to establish his interest in certain lands acquired as partners, and obtained a judgment in his favor. Defendant appeals from the judgment, also from an order denying him a new trial.

The main facts, as shown by the findings, may be briefly stated as follows:—

About November 15, 1885, the plaintiff, who was then county surveyor of San Luis Obispo County, had special knowledge of the location and quality of certain large

tracts of vacant government land on the Carisa plains in that county, then offered at private sale for $1.25 per acre, but he was without means to purchase any of the land.

On or about that date he and the defendant, who was possessed of both means and credit, entered into a verbal agreement whereby the plaintiff, upon his part, agreed to assist in pointing out, locating, and entering in the name of the defendant such portions of the lands as the latter might deem it advisable to purchase for their joint benefit; and the defendant, upon his part, agreed, in consideration thereof, to furnish a team and wagon for the inspection of the lands, to purchase the lands of the government, and furnish the necessary money therefor, and when so purchased, to take charge of and sell the same for cash, at a reasonable profit, as opportunities might occur; and after each sale to deduct from the proceeds of each sale the price paid to the government for the land sold, and pay over promptly to the plaintiff one half of the remainder.

Between the date of the agreement and the fifth day of June, 1886, the plaintiff and the defendant had, pursuant to the agreement, acquired 3,169 acres of land, the title to which stood in the name of the defendant. Upon the latter date defendant gave plaintiff a written acknowledgment to the effect that the defendant had acquired title from the United States government to 3,169 acres of land, and that it was understood and agreed that the plaintiff was to share equally with the defendant in the net profits of the land.

Thereafter, about August 15, 1886, and pursuant to the same agreement, the defendant acquired title to 640 acres of land.

On April 11, 1887, while all the lands were still held under the agreement, the defendant sold and conveyed to one A. R. Taylor, a near relative of the defendant, 1,937 acres of land for the sum of two dollars per acre.

Of this price he received but one dollar per acre, and voluntarily, but without the plaintiff's consent, and contrary to their agreement, gave credit to the grantee for the remainder of the purchase price, which still remains unpaid, the defendant not having taken steps to collect it.

Had this latter amount been collected, the net proceeds of the sale, after deducting the sum of $1.25 per acre paid to the government, would have been the sum of $1,445, one half of which the plaintiff would have been entitled to. Defendant, however, paid him but $125 on account, which the plaintiff admitted in his complaint.

On June 1, 1889, and at various times subsequently, the plaintiff demanded of the defendant an account of of lands sold, and the money received therefor, and also the payment to him of his share of the net proceeds of the sale; but the defendant failed and refused to render him any account, or to pay him any portion of the net profits of the sale, except the sum of $125, admitted as before stated.

Prior to the first demand for an account of the lands sold having been made, that is, on November 1, 1888, the defendant received an offer of three dollars per acre for all the lands acquired under the agreement, and was urged by the plaintiff to accept it; but having sold a portion to Taylor, he could not do so, and has ever since been unable to sell the remainder of the lands.

The land sold to Taylor was the only portion of the lands that the defendant sold, and the only amount of money in which the plaintiff had any interest that the defendant misappropriated was the amount he gave his relative, Taylor, credit for indefinitely.

On these facts the court awarded the plaintiff $597.50, with legal interest thereon from the date of the sale of the portion of the land to Taylor, and an undivided one-half interest in the lands remaining unsold, subject, however, to a lien in favor of the defendant for the sum

of $1.25 per acre, to cover the purchase price he paid therefor to the government.

The defendant contends that the written superseded the oral agreement, and that, according to the latter, the profits were not to be divided until all the lands were sold.

The verbal agreement, alleged in the complaint as the foundation of the action, was entered into in November, 1885, and all the lands in question, except the 640-acre tract, was acquired pursuant to it, nearly seven months before the writing was made, which defendant claims superseded the verbal agreement.

The writing itself does not contain anything inconsistent with the verbal agrement; it merely states the substance of it. The only witnesses examined in the cause were the parties to it, and nowhere in their testimony does it appear that the writing was given or received as a contract which was intended to supersede all their previous negotiations and stipulations concerning the same subject-matter. The defendant testified that "there was no written agreement from January till June, and the reason I made that little writing was, I was afraid that Carpenter was afraid of my verbal agreement, and I told him, at the time, my word was as good as my bond."

The plaintiff testified: "My contract with defendant became complete when the writing of June 5, 1886, was executed. That writing contains the substance of the agreement."

The foregoing is all the testimony that was given concerning the writing, and we think the court was justified in finding therefrom, in view of the contents of the writing itself, that it was given and received as a mere acknowledgment or memorandum of the verbal agreement. The statement of the plaintiff that the contract became complete, etc., must, when read in connection with the defendant's statement of the distrust with

which he thought plaintiff regarded him, mean that he (the plaintiff) felt safe in having a tangible and complete acknowledgment of the existence of their verbal agreement and of his interest in the land, the title to which stood wholly in the name of the defendant. The agreement itself was not completely performed at the time the written acknowledgment of it was given to the plaintiff; it was still executory, and remained so until the judgment herein was entered.

Now, as the verbal agreement was, that the lands were to be sold for cash, at a reasonable profit, as opportunities to make sales should occur, and the profits were to be divided promptly after each sale, it is clear that the plaintiff was not compelled to wait until all the lands were sold for his share of the profits.

Defendant further contends that as he borrowed money with which to purchase the lands, and paid interest thereon, the profits should have been ascertained, in the court below, by deducting from the price for which he sold a portion of the lands to Taylor, not only the $1.25 per acre paid to the government therefor, but the interest he had paid thereon, and the taxes and other expenses necessarily incurred in acquiring, keeping, and disposing of the property.

As to the interest, it is sufficient to say that it was not stipulated for in the agreement; and as to taxes and other necessary expenses, even if they were properly chargeable, there was no evidence of them offered nor claim made therefor at the trial.

It is further urged that no provision was made for the payment of future taxes upon the unsold portion of the lands in which plaintiff was awarded an interest.

It was not necessary to make any further provision therefor, because, as that portion of the lands was divided equally between them, and the plaintiff's interest made subject to a lien for $1.25 per acre in favor of the defendant to secure the purchase price, the plaintiff's

interest is taxable to himself alone, and not to the defendant.

As to the 640 acres purchased under the agreement after the written acknowledgment of June 5, 1886, was given, the court, in awarding the plaintiff his half-interest therein in addition to the lien imposed thereon in favor of the defendant for the price per acre paid by him to the government, extended such lien to cover interest at the legal rate from the date of the purchase of the tract.

The finding upon which this allowance of interest is based is claimed to be unsupported by the evidence. We are inclined to think so, too; but as it is in favor of the defendant, he is not injured by it.

It is also claimed by the defendant that the 640-acre tract was erroneously brought within the agreement. The evidence that it was acquired under the agreement is quite strong; both parties testified that it was so acquired; but the defendant, in order to defeat the plaintiff's claim respecting it, testified as follows: "The written declaration I gave Carpenter embraces all the land described in the complaint, except the 640 acres in sections 5 and 6, township 31 south, 19 east; that I acquired in August afterwards. *If he kept his agreement, that was to be included in it.*" To which we may add, the court found that the plaintiff fully performed the agreement upon his part, and this finding is supported by the evidence.

We advise that the judgment and order be affirmed.

BELCHER, C. C., and VANCLIEF, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 13743. Department Two.—January 5, 1891.]

JAMES LYNCH, APPELLANT, v. C. W. WELBY ET AL., RESPONDENTS.

APPEAL — REVIEW OF CONFLICTING EVIDENCE.—Where there is a plain conflict of evidence upon an issue material to the plaintiff's recovery, and the questions of law are properly submitted to the jury by correct instructions, a verdict and judgment in favor of the defendants will not be disturbed upon appeal.

APPEAL from a judgment of the Superior Court of San Luis Obispo County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Graves, Turner & Graves, for Appellant.

Haggin & Van Ness, and *J. M. Wilcoxson,* for Respondents.

SHARPSTEIN, J.—This action is for the recovery of $3,623 damages, alleged to be sustained by reason of an alleged breach of a contract of the parties by the defendants. The contract was, in effect, that defendants would purchase of the plaintiff all the steers belonging to him on the eleventh day of May, 1888, that were three years old and upwards, and that were then or that would be merchantable beef by the first day of July, 1888, the number of which was estimated by the parties to be about three hundred head.

And the parties further agreed that if there should arise any question between them as to what steers would make merchantable beef, the question should be decided by arbitration, each party to select one arbitrator, and if the two could not agree, they should select a third to settle the question.

Pursuant to this agreement, plaintiff gathered his said band of cattle, and the defendants selected therefrom ninety head of the largest and most choice steers of said

band, and paid the plaintiff therefor at the rate of forty dollars per head, and requested plaintiff to have another and complete gathering of the cattle on the first day of July, 1888, at which time defendants would take the remainder of the steers, as per agreement, and plaintiff gathered and had ready for delivery the residue of his band, consisting of 176 head of steers, which he insisted then, and still insists, were good, merchantable steers. Defendants refused to accept all of said steers, but offered to select from said band only so many as in their opinion were then merchantable beef,—forty-eight, or possibly fifty, head in all. Thereupon plaintiff insisted upon choosing arbitrators, as stipulated in said agreement, to decide how many of said steers were merchantable beef. Plaintiff chose one William Epperson, and the defendant one A. J. Harris, with the understanding if they could not agree they should select a third person to act with them.

It does not appear that the arbitrators so selected ever decided that any of said steers were merchantable beef, or that they ever differed or failed to agree upon how many were or were not merchantable beef, or that they ever selected a third person to act with them. The only reason appearing in the record for not proceeding with the arbitration is, that the defendant Judge announced that he could not abide by the decision of the arbitrators. He said, according to the testimony of one of the witnesses, that Lynch was not willing to do anything toward settling the matter, and as far as he, Judge, was concerned, he would not have another thing to do with the cattle, and turned and rode out of the field. That was evidently treated by all of the parties as a revocation by defendants of their agreement to arbitrate. About two weeks after the failure to arbitrate, plaintiff sold 176 head of cattle to Lux & Miller for $29.68 per head, and this action is prosecuted to recover the difference between the price which defendants agreed to pay for cattle of

the kind and quality specified in their agreement with plaintiff, and the price paid for the 176 head sold to Lux & Miller.

Whether the cattle which defendants refused to accept were of the kind and quality that they agreed to take is a question upon which there is a plain conflict of evidence, and we cannot disturb the verdict of the jury upon that question.

We think the instructions of the court placed the matters in issue fairly before the jury.

Judgment and order affirmed.

THORNTON, J., and MCFARLAND, J., concurred.

[No. 13758. Department Two.—January 5, 1891.]

A. M. DREW, RESPONDENT, v. A. J. PEDLAR ET AL., APPELLANTS.

VENDOR AND PURCHASER—CONTRACT OF SALE—FORFEITURE—RESCISSION—RECOVERY OF PURCHASE-MONEY.—Where a contract for the sale of land provided for a forfeiture of all right to a conveyance, and that the purchase-money paid should be as liquidated damages, in case of non-fulfillment of the terms of future payment by the purchaser, and it appears that full payment of the residue of the purchase-money was tendered and a deed demanded ten months after maturity, and that the vendors refused to accept the tender, or to return the purchase-money paid, and elected to rescind the agreement, the purchaser may maintain an action to recover from the vendors the installment of purchase-money paid.

ID.—ACTION TO RECOVER PURCHASE-MONEY—PLEADING—ELECTION OF VENDOR TO RESCIND—RECOUPMENT OF DAMAGES—JUDGMENT ON PLEADINGS.—If in such action the vendors do not deny the allegation of the complaint that they elected to rescind the contract upon the breach thereof by the plaintiff, and do not seek to recoup any actual damages for the breach from the amount of the purchase-money received, or deny any material averments of the complaint, the plaintiff is entitled to judgment on the pleadings for the recovery of the sum paid to the vendors.

ID.—LIQUIDATED DAMAGES—VOID STIPULATION—CONSTRUCTION OF CODE.—The stipulation in the contract that the purchase-money paid should be taken as liquidated damages for the breach of the contract by the purchaser is void under sections 1670 and 1671 of the Civil Code, it not being imprac-

ticable or at all difficult to fix the actual damage to the vendors, the measure of which is definitely fixed by section 3307 of the Civil Code as the excess of the agreed price, if any, over the value of the property to the vendors.

ID.—JUDGMENT ON PLEADINGS—CROSS-COMPLAINT—CANCELLATION OF CONTRACT.—A cross-complaint by the vendors, seeking the cancellation of an unacknowledged and unrecorded contract of sale as a cloud upon their title, and not offering to refund the purchase-money received, does not entitle them to any affirmative relief, other than that given by a judgment on the pleadings in favor of the plaintiff for a recovery of the purchase-money paid, it being conclusively established by the admissions of the pleadings and by the judgment that the agreement had been rescinded and annulled by the parties.

ID.—PLEADING—DENIAL OF INDEBTEDNESS—CONCLUSION OF LAW.—The denial of indebtedness of the defendants to the plaintiff is a denial of a conclusion of law, and when inconsistent with admitted facts, cannot avail to prevent a judgment for the plaintiff on the pleadings.

ID.—DEMAND.—No demand before suit is necessary to be made or alleged in the complaint in an action to recover purchase-money paid under a contract of sale which the defendants have elected to rescind.

ID.—SETTING ASIDE JUDGMENT ON PLEADINGS — DISCRETION — AMENDED ANSWER—DEFAULT OF PLAINTIFF—RESCISSION.—It is not an error or abuse of discretion to refuse to set aside a judgment on the pleadings for the recovery of the purchase-money upon the proffer of an amended answer which does not deny the rescission of the contract of sale, but only shows that the plaintiff was first in default, by refusing to accept the tender of a deed or to pay the purchase-money.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a motion to set aside the judgment.

The facts are stated in the opinion of the court.

R. B. Terry, and *C. W. Thomas,* for Appellant.

J. R. Webb, and *F. H. Short,* for Respondent.

VANCLIEF, C.—On the twentieth day of April, 1888, the parties to this action entered into a written agreement whereby the defendants agreed to sell and the plaintiff to purchase three lots of land in the town of Fresno at the price of twelve thousand five hundred dollars, to be paid as follows: One thousand dollars upon the execution of the agreement, seven hundred five hun-

dred dollars within sixty days from the date of the agreement, and to assume and pay a mortgage of four thousand dollars to Robert B. Thompson, and also to pay the interest on the mortgage and all taxes thereafter to become due on the land. The agreement also contains the following provision:—

"In the event of the failure to comply with the terms hereof by the said party of the second part, the parties of the first part shall be released from all obligation in law or equity to convey said property, and said party of the second part shall forfeit all right thereto, and all money paid thereon shall be as liquidated damages for the non-fulfillment hereof by the party of the second part. And the said parties of the first part, on receiving such payments at the time and in the manner above mentioned, agree to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed conveying the said land free and clear of all encumbrances made, done, or suffered by the said parties of the first part, except as above specified.

"And it is understood that the stipulations aforesaid are to apply to and to bind the heirs, executors, and administrators and assigns of the respective parties, and that time is of the essence of this contract."

The plaintiff paid one thousand dollars upon the execution of the agreement, but failed to pay the seven thousand five hundred dollars when the same became due, and never offered to pay the same or any part thereof until the twenty-fourth day of April, 1889 (about ten months after maturity), when he tendered full payment, and demanded a deed for the land. The defendants then refused to accept payment or to execute a deed, and also refused to refund to plaintiff the one thousand dollars paid by him upon the execution of the agreement, and elected to rescind the agreement. Thereupon the plaintiff commenced this action to recover the one thousand dollars paid by him upon the execution of

the agreement, formally alleging in his complaint the facts above stated.

The defendants filed an amended answer, in which they expressly admit the execution of the contract and the payment of one thousand dollars as alleged in the complaint, but allege that they have performed their part of the contract, and that plaintiff failed and refused to pay the seven thousand five hundred dollars, or any part thereof, when the same became due, and that he abandoned the contract. They admit, however, that plaintiff made the tender of payment and demand for a deed on April 24, 1889, as alleged in the complaint. They further "allege that on the failure of plaintiff to perform his said covenants, they treated the one thousand dollars heretofore paid as forfeited, and said contract as abandoned by the plaintiff, and annulled, and that they converted the said one thousand dollars to their own use."

They further allege that "the said property had greatly increased in value between June 20, 1888, and April 24, 1889; that said increase was of the value of two thousand dollars."

They "deny that they are indebted to plaintiff in any sum, or that plaintiff has sustained any damages by reason of any act of defendants, or either of them."

To this answer the defendants added a cross-complaint, in which they set out the agreement; allege the payment of the one thousand dollars, the performance thereof on their part, the failure and refusal of the plaintiff to perform on his part, except as to the payment of the one thousand dollars; "that defendants are the owners and in possession of the land described in said contract; that said contract is a cloud upon defendants' title to said land"; and praying that the contract be declared void and of no effect, and that it be canceled, and for such further relief as they may be entitled to.

Upon due notice, plaintiff's counsel moved for judg-

ment on the pleadings. At the time appointed, counsel for the respective parties appeared, and plaintiff's counsel argued the motion, and it was submitted on briefs to be thereafter filed, but defendants' counsel failed to file any brief.

Some time after the expiration of the time agreed upon and allowed for filing briefs, to wit, on October 12, 1889, the court rendered judgment for the plaintiff for one thousand dollars, and interest thereon from April 24, 1889, and costs.

Thereafter, upon due notice, defendants' counsel moved the court to set aside the judgment, on the grounds,— 1. That the complaint does not state facts sufficient to constitute a cause of action; 2. That no written findings of facts were filed or made; 3. That material allegations of the complaint were denied; 4. That no answer was made to the cross-complaint; 5. That the answer stated new matter constituting a defense to the action.

At the same time, defendants' counsel made another motion to vacate the judgment, on the ground "that said judgment was made and entered against defendants through their mistake, misadvertence, and excusable neglect."

This motion was made on affidavits, in connection with which they proffered a draught of a second amended answer which they proposed to file in case the judgment should be set aside.

The following are the affidavits upon which the motion was made:—

"R. B. Terry, being first duly sworn, deposes and says that he is now, and at all times since the defendants have appeared in this action, their attorney in said matter; that when the motion heretofore made by plaintiff for judgment upon the pleadings herein was ordered submitted by the court upon briefs thereafter to be filed by counsel for plaintiff, and briefs of defendants in reply thereto, affiant, upon receiving the briefs of counsel for

plaintiff, was unable to find in the city of Fresno the authorities upon which his answer to said brief would be made, and that upon an examination of said authorities at hand, affiant determined that in order that the case should be fully determined upon its merits, that he would ask leave of the court to file a second amended answer; that so intending, he did not answer such brief.

"R. B. TERRY."

"A. J. Pedlar, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that the judgment herein entered on the twelfth day of October, 1889, was entered through mistake, inadvertence, surprise, and excusable neglect, and was shown in the affidavit of R. B. Terry, filed herewith.

"Affiant further says that he has fully and fairly stated the case in this action to his said counsel, R. B. Terry, who resides in the county of Fresno, state of California, and after such statement, is advised by said R. B. Terry that he has a good and substantial defense on the merits of the action, and thoroughly believes the same to be true. A. J. PEDLAR."

The proffered amended answer contained two averments in addition to the first amended answer, to the effect,—1. That defendants had tendered to plaintiff a sufficient deed for the lots on the twentieth day of June, 1888, and at the same time demanded payment of the sum of $7,500, which, by the terms of the agreement, the plaintiff was to pay "on or before sixty days from the date" of the agreement; but that plaintiff then refused to pay said sum, or any part thereof, and thereby released the defendants from all obligations under said agreement, and thereby also released all claim to the $1,000 theretofore paid by him; and 2. That between April 20, 1888, and April 24, 1889, certain taxes and assessments amounting to $114.65 were levied upon said lots, and became due and payable, and that plaintiff never paid nor tendered them, or any part thereof, and that

defendants were compelled to pay a street assessment of forty-five dollars.

The proffered answer also contained the following, which was not in the first amended answer: "Defendants deny that they, or either of them, elected to rescind said contract of sale in complaint mentioned, or that they did rescind the same, but, on the contrary, allege that plaintiff rescinded said contract and every portion thereof long prior to the twenty-fourth day of April, 1889."

The court denied the motion to set aside the judgment; and the defendants appeal from the judgment, and also from the order denying their motion, upon the judgment roll containing their bill of exceptions.

1. I think there was no error in rendering judgment on the pleadings. It clearly appears that the contract was rescinded long before the commencement of the action, and that it was so considered by both parties. Time was of the essence of the contract. Plaintiff failed to pay the seven thousand five hundred dollars on or before June 20, 1888, according to the agreement, and did not tender payment thereof until April 24, 1889, when the defendants refused to accept it and execute a deed, on the ground that plaintiff had abandoned and annulled the contract by failing to tender payment within the stipulated time,—sixty days. They say in their answer that, upon the failure of plaintiff to pay according to the terms of the contract, they treated the contract as abandoned and annulled by plaintiff, and the one thousand dollars paid as forfeited, and they do not deny the averment in the complaint that they "elected to rescind said contract of sale."

From the time defendants refused to accept payment and execute a deed (April 24, 1889), the plaintiff has considered the contract rescinded, and bases this action partly upon that ground, his complaint stating facts from which a rescission is a necessary inference. Under these circumstances, the plaintiff was entitled to recover the one

thousand dollars paid by him, less such actual damages as may have been sustained by the defendants by plaintiff's breach of the contract (*Grey* v. *Tubbs,* 43 Cal. 364; *Cleary* v. *Folger,* 84 Cal. 316); but such damages cannot be recouped in this action, for the reason that none such has been pleaded. (*Grey* v. *Tubbs,* 43 Cal. 364; *Cleary* v. *Folger,* 84 Cal. 316.)

Counsel for appellants contend, however, that his clients are entitled, under the express stipulation of the contract, to retain the one thousand dollars paid as *liquidated damages;* whereas respondent's counsel claim that the stipulation as to liquidated damages is void. This is the principal issue presented for decision. I think the stipulation is void, under the following sections of the Civil Code:—

"Sec. 1670. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.

"Sec. 1671. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

It appears, from the nature of the contract under consideration, that it would not be impracticable or at all difficult to fix the actual damage in this case, since section 3307 of the Civil Code provides a rule by which the damage, in all cases of this kind, may be measured and definitely fixed, as follows: "The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him." That is, the excess of the agreed price over the value of the property to the party who agreed to sell.

In Field on Damages, sec. 508, the rule is stated as follows: "The general rule of damages on failure of the vendee to take the property purchased, and pay for the same, would be the actual loss sustained by the vendor thereby; which would ordinarily be the difference between the actual contract price and the actual value of the land at the time of the breach, if the property shall have declined in value." (See also *Eva* v. *McMahon,* 77 Cal. 467.)

The defendants not only failed to plead any damages to them, but alleged in their answer an increase of two thousand dollars in the value of the property between the default of the plaintiff and their refusal to accept payment and execute a deed; and as it does not appear that plaintiff ever had possession of the property, but does appear that defendants were in possession at the time they answered, they can claim nothing for use and occupation.

No material averment of the complaint was denied. The denial of indebtedness was but a conclusion of law inconsistent with the admitted facts.

The defendants were not entitled to any affirmative relief upon their cross-complaint which they have not obtained by the judgment on the pleadings. Both the complaint and answer admitted that the agreement had been rescinded and annulled by the parties; and as the judgment on the pleadings partly rests upon that fact, it is conclusive evidence of the fact.

The agreement was not recorded, and not being acknowledged, was not entitled to record. Besides, the cross-complaint does not offer to refund the money, or any part thereof, admitted to have been received by the defendants under the contract. (*Bohall* v. *Diller,* 41 Cal. 533.)

It is urged that the complaint fails to state a cause of action, in that no demand is alleged. The action is to recover money had and received by defendants to the

use of the plaintiff, and it is alleged the defendants "refused and still refuse to pay to plaintiff said sum of one thousand dollars, or any part thereof." The answer admits the receipt of the money, and alleges that defendants "converted the said one thousand dollars to their own use."

From the time the defendants elected to rescind the contract, or to consider and treat it as rescinded, it was their duty to refund the money they had received under the contract, and no demand before suit was necessary. (*Quimby* v. *Lyon*, 63 Cal. 394.)

2. It does not appear that there was any error or abuse of the discretion of the court in overruling the defendants' motion to set aside the judgment, and counsel for appellants has not urged this point here. The averment in the proffered answer that defendants tendered to plaintiff a deed on the twentieth day of June, 1888, and demanded payment, etc., only shows that plaintiff was first in default. It does not change or dispute the fact that both parties considered and treated the contract as rescinded, as above stated, and had it been inserted in the answer on which the judgment was rendered, the plaintiff would still have been entitled to judgment on the pleadings.

I think the judgment and order should be affirmed.

FOOTE, C., and BELCHER, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

[No. 13495. In Bank.—January 6, 1891.]

R. E. WILHOIT ET AL., ASSIGNEES, APPELLANTS, *v.* THOMAS CUNNINGHAM ET AL., RESPONDENTS.

ASSIGNMENT FOR BENEFIT OF CREDITORS—TRUSTS.—A deed of assignment for the benefit of creditors is controlled by the provisions of the Civil Code relative to trusts, and operates to divest the assignor of his entire interest and estate in the property assigned, and to vest the same in the assignees, subject to the rights of the assignor to a reconveyance of any residue remaining undisposed of after the creditors are satisfied, or to payment of the surplus proceeds of sales of the property.

ID.—RIGHTS OF INSOLVENT AND CREDITORS.—An insolvent may in good faith make an assignment for the benefit of creditors with or without their consent, and the creditors must either avail themselves of the assets without preference, or not at all.

ID.—EXECUTION SALE OF ASSIGNED PROPERTY—CLOUD ON TITLE—INJUNCTION.—A creditor whose claims were subsisting credits upon which action had been commenced at the time of the assignment, and who assented thereto, cannot sell any of the assigned property on execution, and such sale may be enjoined as casting a cloud upon the title of the assignees, though the judgments were obtained subsequent to the assignment.

ID.—ATTACHMENT—DISSOLUTION—INSOLVENCY — DISMISSAL. — An attachment levied within one month prior to the filing of a petition in insolvency by the debtor is dissolved by operation of law, and will not justify a sale under execution after dismissal of the insolvency proceedings, and after a subsequent assignment by the insolvent for the benefit of his creditors.

PLEADING—IMPLICATION OF LAW.—That which is implied by law need not be pleaded.

ID.—DEMURRER — AMBIGUITY AND UNCERTAINTY — CONJUNCTIVE STATEMENT OF GROUNDS.—Ambiguity and uncertainty are separate grounds of demurrer, and where such separate grounds are conjoined, the pleading must be defective on each ground, or the demurrer must be overruled.

ID.—WANT OF CAPACITY TO SUE.—A demurrer for want of capacity of the plaintiff to sue only lies where the complaint shows the want of capacity upon its face, and it is not a ground of demurrer that it does not appear in the complaint that the plaintiff has legal capacity to sue. That omission can only be taken advantage of by answer.

ID.—CAPACITY OF ASSIGNEES—AFFIDAVIT TO INVENTORY—ANSWER.—The fact that a complaint by assignees for the benefit of creditors which alleges a valid assignment, and that plaintiffs accepted the trust and duly qualified as such assignees, omits to further allege that the affidavit required by section 3462 of the Civil Code was attached to and filed with the inventory, will not render the complaint demurrable for want of capacity of the plaintiffs to sue, but the omission of such affidavit must be set up in the answer.

APPEAL from a judgment of the Superior Court of San Joaquin County.

The facts are stated in the opinion.

J. C. Campbell, for Appellants.

Carter & Smith, for Respondents.

GIBSON, C.—This is an appeal by the plaintiffs from a final judgment entered against them upon defendants' demurrer to their complaint praying that defendants be enjoined from selling the realty in controversy under certain writs of execution.

It appears by the complaint that Ella Averill, on the sixth day of October, 1885, commenced two separate actions in the superior court of San Joaquin County against M. E. Bryant to recover of him the amounts due upon two promissory notes, and on the same day caused a writ of attachment to issue in each action, and be levied upon certain real estate then belonging to Bryant; that thereafter, on the thirty-first day of the same month, Bryant was by and in the same court adjudged an insolvent debtor, against whom the said creditor, Averill, on the twenty-seventh day of the same month, proved her several claims, including the two promissory notes above mentioned; that on or about the thirtieth day of January, 1886, by the consent of defendant Averill, as such creditor, and all the other creditors, the insolvency proceedings were by an order of the court duly dismissed; that on the sixteenth day of February, 1886, Bryant being still insolvent, at the request of defendant Averill, and his other creditors, executed and delivered to plaintiffs a deed of assignment of all his property not exempt from execution, for the benefit of his creditors, pursuant to division 4, part 2, title 3, of the Civil Code, which deed embraced the real estate levied upon by the writs of attachment above mentioned; that the plaintiffs, as such

assignees, accepted the trust, and in due time qualified as required by law, and entered upon, and still continue in the discharge of the duties of the said trust; that the said deed and a proper inventory were duly filed for record; that defendant Averill assented to the execution and delivery of the deed of assignment to the plaintiffs, and also to the acceptance, by plaintiffs, of the trust thus created; that since the said trust was created, the plaintiffs have been the owners and in the possession of the real estate in controversy, in trust for the benefit of all of the creditors of Bryant, including the defendant Averill; that prior to the execution of said deed, the levies under the writs of attachment above mentioned were dissolved; that on the twenty-first day of September, 1887, in the superior court aforesaid, the defendant Averill obtained a judgment in her favor in each of the suits upon the promissory notes, and caused a writ of execution, regular in form, to issue in each case, and to be placed in the hands of her co-defendant, Cunningham, as sheriff of San Joaquin County, for service; that the said sheriff has by virtue of said writs of execution levied upon and threatens to, and unless restrained by injunction will, sell the real estate in question, and thereby cast a cloud upon the plaintiffs' title thereto, which will prevent them from executing their trust expeditiously and with advantage to the creditors of Bryant; that the said execution levies were made for the express purpose of hindering the plaintiffs from executing their trust.

The grounds of demurrer are:—1. Insufficiency of the facts stated to constitute a cause of action. 2. Ambiguity *and* uncertainty of the facts in certain specified particulars. 3. Incapacity of the plaintiffs to sue, because it does not appear that the inventory was verified, as required by section 3462 of the Civil Code.

1. In support of the first ground of demurrer, the respondents contend that the assignor still retains an equitable interest in the land in controversy, which was

included in the deed of assignment, and that it is subject to sale upon execution. But this argument does not apply to the facts. The allegation is, that the defendant Cunnigham, as sheriff, has levied upon and threatens to sell, not only the assignor's equitable interest in the residuum of the property assigned, but the whole of the property itself, thereby including the assignees' legal title thereto, as well as the equitable interest of the assignors in the residuum, if there should be any.

The deed of assignment is controlled by the provisions of the Civil Code relative to trusts. (Civ. Code, sec. 3449.) Those provisions, so far as applicable here, are as follows:—

"Sec. 863. Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.

"Sec. 864. Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust."

The trust created by the deed of assignment here relates to real property, and was expressly created for the benefit of the creditors of the assignor. There was no reservation in it of any estate or interest to the assignor except that authorized by secion 864 of the Civil Code, wherein the assignor provides that the residuum left after his creditors are satisfied shall be returned to him, his executors, administrators, or assigns. No other estate or interest could be reserved in a trust of this character. (Civ. Code, sec. 3457, subd. 4.) The effect of the deed, then, was to divest the assignor of his entire interest and estate in the property assigned, subject to

the right to a reconveyance of any residue remaining undisposed of after the creditors are satisfied, or payment of the surplus of the proceeds of the sales of the property.

This is in accordance with the weight of authority in other jurisdictions, as shown in Burrill on Assignments, 5th ed., sec. 298.

Under our law as declared in the Civil Code, an insolvent may, in good faith, make an assignment for the benefit of his creditors, with or without the consent of the latter; and when such an assignment is made, the creditors must either avail themselves of the assets without preference (section 3457), or not at all.

The object of the law is to enable a debtor, through his assignee, to dispose of his property for the benefit of his creditors. This object would be defeated if one of the creditors could ignore the assignment, and sell the property to satisfy his particular claim. Such a sale would, if it could be made, deprive the assignees of the property; or if it would not, still the sale would cloud the title of the assignees, because in any action they might have to prosecute for the removal of the cloud so cast, the evidence of the purchaser's title would show that such latter title was derived from the assignor, to overcome which the assignees would have to prove that the judgments were obtained in actions commenced before the deed of assignment was made upon debts covered and provided for by the deed of assignment. (*Pixley* v. *Huggins*, 15 Cal. 137; *Porter* v. *Pico*, 55 Cal. 165; *Roth* v. *Insley*, 86 Cal. 134.) Such a cloud, it is evident, would prevent them from disposing of the property to the advantage of the creditors in the performance of their trust.

The respondents further contend that the threatened sales, if made, would not cast a cloud upon the assignees' title to the property, inasmuch as the judgments upon which the executions were issued were obtained subse-

quent to the assignment, and therefore all that could pass under the sales would be the equitable interest of the assignor in the residuum of the property assigned.

But the facts here show that the actions in which she obtained her several judgments were begun upon subsisting credits before the assignment was made, and that as such a creditor she assented to the assignment. Therefore she is one of the creditors for whose benefit the assignment was made, and, as such, must take her proportionate share with the other creditors. Besides, as already shown, the execution levies were not restricted to the equitable interest of the assignor in the residuum, but were made upon the whole property.

It is further claimed by the appellants that as the complaint shows that defendant Averill acquired a lien by attachment in each of the actions in which she obtained her judgments, above mentioned, before the assignment was made, and as it does not appear that those attachments were dissolved, the liens so acquired became merged in the judgments, and in consequence she is entitled to sell the realty in question to satisfy such judgments. But it is distinctly alleged that those attachments were dissolved, but the date is not stated. If, however, the absence of the date renders it insufficient, it appears, from the allegations respecting the insolvency proceedings which preceded the assignment, and which are pleaded as matters of inducement, that the attachments were levied within one month prior to Bryant filing his petition in insolvency. Since this is so, the attachments became dissolved by operation of law. (Insolvent Act of 1880, sec. 17.) And that which is implied by law need not be pleaded. (*Kramer* v. *Halsey,* 82 Cal. 209.)

2. The second ground of demurrer is in the conjunctive; that is, that the complaint is ambiguous *and* uncertain. These are made separate grounds of demurrer by subdivision 7 of section 430 of the Code of Civil Procedure. And in the case of *Kramer* v. *Halsey,* 82 Cal.

209, it was held that where such separate grounds of demurrer are conjoined, the complaint must be defective on each, or the demurrer must be overruled. There the complaint was held to be neither ambiguous nor unintelligible, but uncertain in several particulars, and the demurrer upon the ground of ambiguity, unintelligibility, *and* uncertainty not sustainable.

In this case we do not think the complaint is ambiguous. There is but one respect in which it may be said to be so, and that is wherein it is stated that the defendant Averill, as a creditor, proved her claim in the insolvency proceedings several days before Bryant was adjudged an insolvent. But as those proceedings were dismissed, this allegation is immaterial. The complaint is uncertain with regard to dates, as in *Kraner* v. *Halsey,* 82 Cal. 209, as well as in several other respects; but as it is not both ambiguous and uncertain, it comes within the rule of that case.

3. As to the capacity of the plaintiffs to maintain this action as assignees, it is urged that as it does not appear from the complaint that the affidavit required by section 3462 of the Civil Code was attached to and filed with the inventory, the assignment in consequence was void, and the plaintiffs are therefore without legal capacity to sue.

In the case of *District No. 110* v. *Feck,* 60 Cal. 405, this court said: "The defendants demurred to the complaint. The first ground of demurrer is, that the complaint does not state facts sufficient to constitute a cause of action. The objections specified are, in substance, that it does not appear from the complaint that the plaintiff was ever duly created a swamp and overflowed land district. That objection, however, if well taken, would go to the legal capacity of the plaintiff to sue, and not to the sufficiency of the facts stated to constitute a cause of action. (*Phœnix Bank* v. *Donnell,* 40 N. Y. 410.) A demurrer on the ground that plaintiff has not the legal capacity to sue would be bad, because it does

not appear upon the face of the complaint that the plaintiff has not. It is not a good ground of demurrer that it does not appear in the complaint that the plaintiff has the legal capacity to sue. That omission can only be taken advantage of by answer." (Code Civ. Proc., sec. 433; *Phœnix Bank* v. *Donnell,* 40 N. Y. 410. See also *Miller* v. *Luco,* 80 Cal. 257.)

In the present case it appears by sufficient allegations, the defect not having been specially pointed out under the first ground of demurrer, that Bryant made a valid assignment for the benefit of his creditors, and that the plaintiffs, as assignees thereunder, accepted the trust, and duly qualified as such assignees. It therefore appears affirmatively that the plaintiffs have the legal capacity to sue. And if it be a fact that the affidavit, which seems to be essential to the validity of the assignment (Civ. Code, secs. 3461–3463, 3465; *Beardsley* v. *Frame,* 85 Cal. 134), was omitted, then, under the rule applied in *District No. 110* v. *Feck,* 60 Cal. 405, such omission must be set up in the answer, because it does not affirmatively appear upon the face of the complaint that such affidavit was omitted.

We therefore advise that the judgment be reversed, with instructions to the trial court to overrule the demurrer to the complaint, and grant defendants leave to answer within the usual time.

VANCLIEF, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is reversed, with instructions to the trial court to overrule the demurrer to the complaint, and grant defendants leave to answer within the usual time.

[No. 13735. Department One.—January 13, 1891.]

JOHN PETTINGER, RESPONDENT, *v.* SALATHEIL FAST, APPELLANT.

VENDOR AND PURCHASER—SHARING PROFITS OF RESALE.—A contract for the sale of a farm for a specified sum, and one half of the excess above that sum for which the farm can be resold, does not require an actual resale in order to fix liability for one half of the profits which might be realized by accepting any *bona fide* offer.

ID.—RESALE FOR ADVANCE—AGREEMENT TO RESELL.—If an actual resale of the farm for an advance is alleged in the complaint in an action to recover one half of the excess, such allegation is sufficiently sustained by proof of an agreement of the vendee to resell the farm for an advance, though no money was paid upon the contract of resale.

ID.—AMOUNT OF RESALE—VARIANCE.—If the complaint alleges a resale of the farm for a specified amount, and the proof shows a resale for two thousand dollars less than the amount alleged, with a reservation of standing timber of the value of two thousand dollars, the proof is at variance with the allegation of the complaint, and a finding that the amount of resale is as alleged is not sustained by the evidence.

ID.—RIGHTS OF VENDOR—RECOVERY FOR TIMBER RESERVED—PLEADING.—The vendor's right to recover upon the contract for one half the excess for which the farm can be resold is not limited to the sum agreed to be paid, in case of a resale by the vendee with reservation of timber; but the vendor may recover, in addition to one half the excess in price paid for the farm, one half the market value of the timber reserved, or one half of the net sum for which it may be sold, at his option, though such recovery can only be justified by a complaint showing the facts as they really exist.

APPEAL from a judgment of the Superior Court of Santa Barbara County, and from an order denying a new trial.

The agreement on which the action is founded, in addition to the provisions recited in the opinion, contained a further provision, to the effect that the farm should not be resold for less than five thousand dollars. The further facts are stated in the opinion of the court.

Putnam & Nichols, for Appellant.

W. P. Butcher, and *B. F. Thomas,* for Respondent.

DE HAVEN, J.—Action to recover the sum of $1,950, alleged to be due plaintiff for the balance of the purchase

price of land conveyed by plaintiff to defendant. The court below gave plaintiff judgment for that sum, and also denied defendant's motion for a new trial, and the defendant appeals from such judgment and order.

The facts as found show that on November 17, 1886, plaintiff executed to appellant a deed of his farm, the appellant agreeing in writing to pay therefor the sum of four thousand dollars, and to give one half of all in excess of that sum which "the farm can be sold for within two years," such additional sum "to be also a part of the purchase price, when so sold for a larger sum." It is also found that on September 1, 1887, "appellant entered into an agreement in writing with one Ed. Culbert, whereby he sold to said Culbert the said parcels of land for the sum of eight thousand dollars."

The principal question to be determined on this appeal is, whether the finding of the court in relation to the sale of the land is justified by the evidence. It was shown upon the trial that on September 1, 1887, the appellant and one Culbert entered into an agreement in writing by which the appellant "promises and agrees to sell and convey unto the party of the second part (Culbert) and to make and execute and deliver to him a deed" of the land purchased by appellant from the plaintiff in this action, the said Culbert "to have and to hold all and singular said premises, together with all the tenements, hereditaments, and appurtenances thereunto belonging, ... except that portion of the timber thereon hereinafter mentioned and reserved unto the party of the first part." The agreement further recited that the appellant was to have all the timber on said land, "except that on the southern line of the mesa, adjoining the Rincon rancho, and on the east end of said mesa."

It is clear that, under appellant's agreement with respondent, an actual sale of the farm within the time limited was not indispensably necessary in order to establish as a fact the price for which it could have been sold, and

thus fix the liability of appellant thereunder. The appellant would not have been at liberty to reject any *bona fide* offer of purchase for a sum exceeding five thousand dollars, without the consent of the respondent. But the complaint alleges an actual sale to Culbert for the sum of eight thousand dollars, and the court so finds, and it is therefore necessary to consider whether such fact was established upon the trial.

The appellant insists that there was no sale to Culbert at all, but only an agreement to sell. But we are of opinion that such contention cannot be sustained. In the case of *Eaton* v. *Richeri,* 83 Cal. 185, the plaintiff therein was to wait for any balance that might be due him until certain mining property was sold and an executory contract for the sale of the mine was made, and the court held that the plaintiff could recover, saying: "The word 'sold' does not necessarily and in all connections mean that a conveyance must be made or that the title must pass."

The fact that no money was received by appellant on the contract is immaterial. The transaction was none the less a sale, and by it the equitable title of the property sold passed to Culbert. But in one respect the evidence does not sustain the finding of the court as to this sale. The written agreement of sale contained a reservation of standing timber, and we think, notwithstanding some confusion in the evidence, that the real transaction between appellant and Culbert was a sale of the farm for the sum of six thousand dollars, and the appellant reserving the growing timber thereon, as specified in the contract of sale. The fact that this timber may have been estimated by both appellant and Culbert as of the value of two thousand dollars, or that appellant's price for the land with timber standing was eight thousand dollars, and with a reservation of such timber, six thousand dollars, cannot change the terms of the actual sale as made to appear by the written con-

tract of sale. By that contract, as we have said, the farm was sold for the sum of six thousand dollars, the appellant reserving as an interest therein the standing timber referred to; and proof of such contract is at variance with the contract alleged in the complaint and found by the court; and the finding that the farm was sold for the sum of eight thousand dollars is not sustained by the evidence.

Undoubtedly, the respondent's right to recover on his contract is not limited to the sum agreed to be paid by Culbert; but if he seeks to recover more, it must be upon a complaint which shows the facts as they really exist. Upon the execution of the contract of sale, appellant disabled himself from thereafter accepting any *bona fide* offer for the farm, and the respondent became entitled to recover, not only upon the basis of the price agreed to be paid by Culbert, but in addition thereto, one half of the market value of the standing timber reserved, or at his option, one half of the net sum for which such timber may have been sold by appellant.

Judgment and order reversed.

PATERSON, J., and GAROUTTE, J., concurred.

Hearing in Bank denied.

[No. 13919. Department Two.—January 13, 1891.]

ROBERT McFADDEN ET AL., RESPONDENTS, *v.* THE SANTA ANA, ORANGE, AND TUSTIN STREET RAILWAY COMPANY, APPELLANT.

NEGLIGENCE—INJURY TO WIFE—CONTRIBUTORY NEGLIGENCE OF HUSBAND.—Contributory negligence of the husband is imputable to the wife, and will prevent a recovery by her for injuries sustained by the alleged negligence of a third party.

ID.—DAMAGES FOR PERSONAL INJURY—CHOSE IN ACTION—HUSBAND AND WIFE—COMMUNITY PROPERTY.—The right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose

in action; and if acquired by the wife during marriage, is community property, which the husband has the right to control.

Id.—Action for Damages — Parties — Husband and Wife.—The husband is a necessary party to an action for damages on account of injuries to the wife's person.

Id.—Evidence—Cross-examination — Injury — Summoning Physician.—Where the plaintiff has testified upon direct examination as to the injury suffered by her and the pain immediately resulting therefrom, she may be asked on cross-examination as to whether she called a doctor that night.

Id.—Expert Evidence—Consultation of Physicians—Cross-examination as to Conclusion and Treatment.—Where a physician, as an expert, has testified in chief that he visited the plaintiff about two weeks after the injury, and held a consultation with the attending physician, and that he examined the patient as to her condition and the probable causes of her ailments, it is proper cross-examination to ask what they determined was the serious thing to attend to, and what was the treatment advised.

Evidence—Range of Cross-examination.—The cross-examination of a party, or of an expert, should be allowed a liberal range, touching all matters testified to in chief, or tending to test the temper, bias, motives, intelligence, accuracy, credibility, or means of knowledge of the witness.

Appeal from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion.

Victor Montgomery, and *O. Caswell,* for Appellant.

Charles S. McKelvey, and *H. T. Matthews,* for Respondents.

Vanclief, C.—Action for damages alleged to have been sustained by a personal injury to the wife alone, through the negligence of defendant.

On May 26, 1888, the defendant was a corporation owning and operating a street-railroad running east and west through the center of Fourth Street, in the city of Santa Ana, in Los Angeles County. On that day it caused an excavation to be made in that street about six feet wide, fifty feet long, and ten inches in depth, on the north side of the railway, parallel with it, and about six feet from it, for the purpose of constructing a switch or

turn-out, to be connected with the main railway, and for the construction of which it had permission from the city authorities.

It is alleged in the complaint that the excavation was dangerous to travelers on the street during the night-time, unless properly guarded and lighted, and that it was the duty of the defendant to guard and light it, so as to warn travelers of the danger, etc., which the defendant neglected to do on the night of May 26, 1888.

The complaint then proceeds as follows:—

"That on, to wit, the twenty-sixth day of May, 1888, the plaintiffs herein were lawfully driving along the same, and they, the plaintiffs, had no warning of or notice of the existence of the aforesaid excavation and obstructions, and they, the plaintiffs, saw no lights or barriers about the said excavation and obstructions, and without any fault of either of the plaintiffs, they, the plaintiffs, came in collision with the said obstructions, and were *drawn* over the same into the *excavation* aforesaid, whereby Flora McFadden sustained great injuries in her person, and internal injuries by which her womb was displaced, and by reason of said injuries to her person, and said internal injuries, she was confined to her bed for many months, and endured great *physical* and *mental suffering*. Her health is injured and impaired thereby, and the plaintiffs are informed and believe that the injuries sustained by Flora McFadden, in her person and to her health, are permanent and for life, and that the same were caused by the gross negligence, default, and carelessness of the defendant herein, by reason of all which the plaintiffs are damaged in the sum of twelve thousand dollars."

The answer of the defendant denies the alleged injuries to the plaintiff Flora, denies the alleged negligence on its part, and alleges contributory negligence on the part of the plaintiffs.

The case was tried by a jury. Verdict and judgment

for the plaintiffs for one thousand dollars. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

The principal question for decision arises upon instructions to the jury as to the effect of contributory negligence, if any there was, on the part of the husband alone.

At the request of the plaintiff, the court instructed the jury that if they found that the plaintiff Flora was injured by the negligence of the defendant, without any negligence on her part, and that the negligence of her husband, if any, only contributed to the injuries, the jury could not attribute the husband's negligence to her, and should assess such damages as will compensate her for injuries proximately caused by the negligence of the defendant. And again: "If you find, from the evidence, that the negligence of Robert McFadden, if any, only contributed to the injury complained of, if any was sustained, his negligence cannot be imputed to Flora McFadden, and must not be regarded as her negligence."

Defendant's counsel excepted to these instructions, and requested the court to instruct the jury that contributory negligence of the husband, if any, was imputable to the wife, and, under the circumstances of this case, would prevent a recovery; which the court refused to give.

I think the court erred in giving these instructions, and in refusing to instruct, substantially, as requested by the defendant's counsel. (*Peck* v. *N. Y. etc. R. R. Co.*, 50 Conn. 379; *Carlisle* v. *Sheldon,* 38 Vt. 440; *Huntoon* v. *Trumbull,* 2 McCrary, 314; Beach on Contributory Negligence, 113, 114, 284.)

The right to recover damages for a personal injury as well as the money recovered as damages, is property, and may be regarded as a chose in action (*Chicago etc. R. R. Co.* v. *Dunn,* 52 Ill. 260; 4 Am. Rep. 606; Anderson's Law Dict.); and if this right to damages is acquired by

the wife during marriage, it, like the damages when recovered in money, is, in this state, community property of the husband and wife (Civ. Code, secs. 162–164, 169), of which the husband has the management, control, and absolute power of disposition other than testamentary. (Civ. Code, sec. 172.) Consequently, the wife cannot sue alone for damages on account of an injury to her person, as she is permitted to do "when the action concerns her separate property." (Code Civ. Proc., sec. 370; *Tell* v. *Gibson,* 66 Cal. 247.) In these respects, our codes differ from the laws of those states in which the cases cited by appellants were decided, wherein the right to recover for a personal injury to the wife, and the money recovered, are deemed her separate property. In the case of *Flori* v. *City of St. Louis,* 3 Mo. App. 231, the husband and wife sued for a personal injury to the wife alone, and the trial court instructed the jury, in effect, that if the husband was guilty of negligence directly contributory to the injury there could be no recovery in the action. Of this instruction the appellate court said: "We do not so understand the law. The contributory negligence of the plaintiff will bar a recovery, where the plaintiff is the injured party, and the recovery is for his benefit. But here the husband is merely a formal party, the cause of action belonging to the wife. Under our law (Acts 1875, p. 6) "any property, including rights in action, ... which has grown out of any violation of the personal rights of a *feme covert,* is her separate property, and under her sole control, and is not liable for the debts of her husband."

In *Platz* v. *Cohoes,* 24 Hun, 101, the decision that the negligence of the husband could not be imputed to the wife, in a case like this, was put solely upon the grounds that the wife was a mere passenger in her husband's wagon, and that her husband had no *joint interest with her, and was in no way identified with her.* On appeal from this decision of the supreme court, the court of ap-

peals held that the question as to contributory negligence of the husband did not arise, and declined to decide it. (*Platz* v. *Cohoes,* 89 N. Y. 219.)

In the case of *Chicago etc. R. R. Co.* v. *Dunn,* 52 Ill. 260; 4 Am. Rep. 606, it was held that the right of the wife to sue for an injury to her person was her separate property, under a statute of that state providing that all property shall be separate property of the wife "which any married woman, during coverture, acquires in good faith, from any persons other than her husband, by descent, devise, *or otherwise.*"

In Shearman and Redfield on Negligence, 4th ed., section 67, it is said: "But in New York, Missouri, and other states, where the change has been radical, and married women have a right to recover, in such cases, damages *for their own separate use,* it is held that the negligence of the husband while in company with his wife is not chargeable to her, unless she encouraged him in it, or otherwise concurs in it." No other authority is cited for this than the cases above considered.

2. The appellant's counsel complain that the scope of their cross-examination of plaintiff's witnesses was too much restricted by the court. Of the numerous exceptions taken on this ground, I think the following should be sustained:—

1. After the plaintiff Flora had testified on behalf of plaintiffs as to the injury, and the pain suffered by her immediately thereafter, defendant's attorney, on cross-examination, asked the following questions:—

Q. "Well, you was conscious, wasn't you?"

A. "I was conscious of a very severe pain."

Q. "Well, you went home that night, and didn't call a doctor?"

Mr. McKelvey.—"We object. I don't think it responsive to the direct examination."

The court sustained this objection, and the defendant's counsel excepted.

2. Dr. Ball, as an expert, testified in chief, on the part of the plaintiffs, that he visited the plaintiff Flora about two weeks after the injury, in consultation with Mrs. Dr. Howe, the attending physician, and further testified that he examined the patient as to her condition at that time and as to the probable causes of her ailments. On cross-examination, defendant's counsel asked the following questions:—

Q. "You had a consultation, then, did you?"

A. "Yes, sir."

Q. "What was the determination by you and the attending physician as to what was the serious thing to attend to?"

Mr. Brusseau.—"I object to the evidence, for the reason that the same is immaterial and incompetent."

The court sustained this objection, and defendant's counsel excepted.

3. Counsel then asked Dr. Ball what was the treatment advised then (at the consultation). The objection to this question, on the grounds that it was immaterial, incompetent, and irrelevant, was sustained by the court, and counsel excepted.

That all these questions were in the proper line of cross-examination, and that each of them might have elicited testimony which would have been competent, relevant, and material, seems too plain for argument. One of the witnesses being a party testifying on her own behalf as to the pain she suffered,—a matter as to which it would have been difficult to contradict her,—and the other testifying as an expert medical witness, their cross-examination should have been allowed a liberal range touching all matters testified to in chief, or tending to test the temper, bias, motives, intelligence, accuracy, credibility, or means of knowledge of the witness.

Whether or not these errors, in excluding proper cross-examination, may have been prejudicial to the defendant, need not be determined, since the judgment should

be reversed on the ground of error in the instructions to the jury.

Other points are made by counsel for appellant, but, in my opinion, the record shows no other errors than those above considered.

I think that the judgment and order should be reversed, and the case remanded for a new trial.

FOOTE, C., and BELCHER, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are reversed, and the case remanded for a new trial.

Hearing in Bank denied.

[No. 13665. Department Two.—January 15, 1891.]

C. J. BRUMLEY ET AL., RESPONDENTS, *v.* ROBERT FLINT, APPELLANT.

OBJECTIONS TO EVIDENCE—WAIVER OF GROUNDS NOT SPECIFIED.—A party objecting to the admission of evidence must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not specified.

ID.—GENERAL OBJECTION—SPECIAL OBJECTION.—A general objection is sufficient if the evidence objected to is absolutely inadmissible for any purpose; but otherwise, to entitle the objection to notice, it must be distinctly specified.

ID.—DAMAGE BY CATTLE—OPINION EVIDENCE—QUALIFICATION OF WITNESS—APPEAL—OBJECTION FOR FIRST TIME.—In an action to recover damages for trespass of cattle, where a witness was asked to state what amount of damage, in his estimation, was done by the cattle, and the question was objected to as incompetent, irrelevant, and immaterial, as asking for a conclusion, and as not the proper way to prove damages, the point that the witness was not shown to possess the requisite knowledge to enable him to testify as to the damages is not raised by the objection, and will not be considered for the first time on appeal.

DAMAGE BY CATTLE—EXCESSIVE VERDICT—CONFLICTING EVIDENCE—SUBLEASE OF PREMISES TRESPASSED UPON.—Where the evidence as to the number of trespassing cattle and as to the damage done by them is conflicting, and the evidence on the part of the plaintiffs tended to show greater damage than was

awarded to them, the verdict will not be set aside as excessive on account of the fact that the premises trespassed upon were afterward subleased for one half more rent than was paid for them by the lessee.

APPEAL from a judgment of the Superior Court of San Luis Obispo County, and from an order denying a new trial.

The facts are stated in the opinion.

W. H. Spencer, for Appellant.

W. B. Dillard, for Respondents.

BELCHER, C.—In December, 1887, one Chester R. Brumley leased from the owner 16,320 acres of grazing land for the year 1888. Between January 1 and February 7, 1888, the defendant's cattle wrongfully entered upon a portion of this land, and ate up, trod down, and destroyed the grass and feed growing thereon. In May, 1888, the said Brumley died, and thereafter the plaintiffs were duly appointed and qualified as executors of his will. The plaintiffs, as such executors, brought this action to recover damages for the alleged trespasses of defendant's cattle in the sum of one thousand dollars. The case was tried before the court, without a jury, and by the judgment the plaintiffs were awarded the sum of $325 and costs of suit. From this judgment, and an order denying a new trial, the defendant appeals.

1. At the trial C. J. Brumley was called as a witness for plaintiffs, and, after stating that he was the son of Chester R. Brumley and one of the plaintiffs, proceeded to testify as follows: "I know the land described in the complaint, and have known it for the past fifteen years; it is grazing land. I know defendant's cattle; they are branded with a star. I saw defendant's cattle on the land described in the complaint many times during January and February, 1888,—eight, nine, eleven, or

twelve hundred of them,—and they were trespassing on the land. There were many fresh rain water-pools on the land, and the cattle ranged there. The ground was wet during these months, there having been a heavy snow-storm and much rain, and the cattle injured and damaged the pasture greatly by treading it down and eating it. For the past five years I have been in the cattle business, near this land."

The witness was then asked by plaintiffs' counsel to state what amount of damage, in his estimation, was done by the cattle during the time they were trespassing upon the land. The defendant objected to the question, "upon the ground that the same was incompetent, irrelevant and immaterial, as asking for a conclusion which the court was to arrive at from the facts given in testtimony, and further, as not the proper way to prove damages." The court overruled the objection, and the defendant reserved an exception. The witness then answered: "The damage from eating up, treading down, and destroying the grass on the land by defendant's cattle during the time you mention would, in my estimation, amount to seven hundred or eight hundred dollars."

It is now urged for appellant that the ruling above mentioned was erroneous, because the witness had not been "shown to possess the requisite knowledge of the value of the property claimed to have been injured by defendant's cattle"; and in support of this position *Reed* v. *Drais,* 67 Cal. 491, is cited.

It is not claimed that the answer to the question, if given by a competent witness, would have been incompetent, irrelevant, or immaterial, and upon that question we are not called upon to express an opinion. It will be observed here that the objection was, not that the witness was incompetent, for want of sufficient knowledge, to testify as to the damages, but only that it was not the *proper way* to prove damages.

The general rule is, that "a party objecting to the admission of evidence must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not so specified." (*People* v. *Manning,* 48 Cal. 338.)

It is true that a general objection is sufficient, if the evidence objected to is absolutely inadmissible for any purpose. (*Nightingale* v. *Scannell,* 18 Cal. 315.) But otherwise, to entitle the objection to notice, "the party should have laid his finger on the point at the time." (*Martin* v. *Travers,* 12 Cal. 243; *Cochran* v. *O'Keefe,* 34 Cal. 558.)

Conceding, therefore, without deciding, that the witness was not shown to possess the requisite knowledge to enable him to testify as to the damages, still we do not think the point made can be considered here, for the reason that that objection to the question was not taken.

In *Reed* v. *Drais,* 67 Cal. 491, there is nothing in conflict with what has been said. In that case, as shown by the record, a witness was asked to give the value of certain land, and the testimony was objected to, and excluded by the court, "on the ground that the witness had not shown himself competent to testify on that point." In affirming the judgment, the court, among other things, said: "There is no doubt that a witness acquainted with the value of the property may give an opinion as to such value, but he must first be shown to possess the requisite knowledge, and then, although such knowledge is not the result of any peculiar skill in a particular pursuit or branch of business, or department of science, he may yet be heard. Where, however, the knowledge is wanting, the opinion should be rejected. We think, therefore, the court did not err in refusing to admit the testimony."

2. It is claimed that the evidence was insufficient to justify the decision of the court, that plaintiffs were damaged in the sum of $325 by reason of the trespass.

But the evidence was conflicting as to the number of cattle that committed the trespasses, and as to the damage done by them. On the part of the plaintiffs the evidence tended to show that they were entitled to a larger sum than was awarded to them. The fact that the deceased, Brumley, paid as rent for all the leased premises only one thousand dollars, and, some time after the trespass, subleased them for fifteen hundred dollars, is not controlling. We cannot say, therefore, that the judgment should be reversed or modified because the damages allowed were excessive.

We think the judgment and order should be affirmed. and so advise.

VANCLIEF, C., and HAYNE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[No. 14076. In Bank.—January 17, 1891.]

PEOPLE EX REL. J. R. LAINE, RESPONDENTS, *v.* G. G. TYRRELL, APPELLANT.

OFFICE—VACANCY—APPOINTMENT BY GOVERNOR.—An appointment by the governor, during a recess of the legislature, for a term of four years, to fill a vacancy in the membership of the state board of health, is in legal effect merely an appointment during the recess of the legislature, and until the adjournment of its next session.

ID.—CONFIRMATION OF SENATE.—Upon the issuance of a commission to fill a vacancy, the appointment is complete, and needs no action of the senate to confirm it.

ID.—HOLDING OVER—QUALIFICATION OF SUCCESSOR—CONSTRUCTION OF POLITICAL CODE.—Section 879 of the Political Code, declaring that every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified, applies to officers appointed temporarily by the governor to fill a vacancy.

ID.—EXPIRATION OF TERM—POWER OF GOVERNOR.—The mere expiration of the term of the incumbent of an office does not create a vacancy such as the governor alone is authorized to fill by the appointment of a successor.

ID.—APPOINTMENT WITH CONSENT OF SENATE—COMMISSION.—In the matter of an executive appointment with the consent of the senate, the issuance of a commission is a part of the act of appointment.

ID.—QUALIFICATION—CREATION OF VACANCY.—An appointee is not required to qualify until he has received his commission, and his failure to qualify cannot create a vacancy, if he has received no commission.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Clinton L. White, for Appellant.

Members of the state board of health are appointed by the governor, with the consent of the senate. The term of office is four years. (Pol. Code, secs. 368, 369.) Vacancies occurring in office during the recess of the legislature, the appointment to which is vested in the governor and senate, must be filled by appointment made by the governor, but the person so appointed can only hold the office until the adjournment of the next session of the legislature. (Pol. Code, sec. 1000.) A vacancy in office is defined by statute, and unless the particular case comes within the definition, there is no vacancy such as gives life to the appointing power of the executive. (Pol. Code, sec. 996; *People* v. *Tilton,* 37 Cal. 614; *People* v. *Whitman,* 10 Cal. 45.) An incumbent may hold over after his term until his successor is qualified, and no vacancy is created, in such case, which the governor can fill without the consent of the senate. (Pol. Code, sec. 879; *People* v. *Bissell,* 49 Cal. 407.)

Attorney-General Johnson, and *A. L. Hart,* for Respondents.

The governor might appoint without consent of the senate to fill a vacancy temporarily. (*People* v. *Cazneau,* 20 Cal. 504.) But this was the limit of his power, and he could not vest title to the office for the unexpired term.

His appointment of Dr. Tyrrell must either be construed as an appointment to fill a vacancy, or as an absolute nullity. The confirmation of the senate could not take effect until a commission was issued under it. Section 879 of the Political Code has no application to a person appointed under section 1000 to fill a vacancy temporarily. Such person cannot hold over, else the temporary limitation is abortive. It was the intention to limit the holding of such an appointee. (*People* v. *Whitman,* 10 Cal. 38; *People* v. *Tilton,* 37 Cal. 614.) The defendant did not qualify under his appointment for the term, and this created a vacancy which the governor was authorized to fill. (*People* v. *Taylor,* 57 Cal. 620.)

DE HAVEN, J.—On November 17, 1884, during a recess of the legislature, a vacancy existed in the membership of the state board of health, and on that day the appellant, Tyrrell, was appointed a member of said board, and in the commission issued to him by the governor it was recited that he was thereby appointed "a member of the state board of health, *vice* F. W. Hatch, deceased, *for the term expiring January 11, 1888.* Appellant duly qualified as such officer November 19, 1884, and since that date has continued to discharge the duties of said office.

Upon January 10, 1885, the legislature being in session, the governor transmitted to the senate a message informing that body of appellant's said appointment on November 17, 1884, *"for the term of four years, vice F. W. Hatch, deceased,"* and the senate was requested to consent thereto. The senate took action upon said message, and the question, "Will the senate advise and consent to the appointment of G. G. Tyrrell, of Sacramento, as a member of the state board of health for the term of four years, *vice* F. W. Hatch, deceased?" was decided in the affirmative. The governor did not thereafter issue to appellant any commission for said office, nor has

he since such action of the senate taken any oath of office as a member of said board.

On March 18, 1889, during a recess of the legislature, the governor appointed the relator, Laine, to the said office of member of state board of health, and upon that day he duly qualified as such.

The judgment of the court below was in favor of the relator, and ousting the appellant from said office. From this judgment, and an order denying his motion for a new trial, the defendant, Tyrrell, appeals.

We think the commission issued by the governor to appellant on November 17, 1884, must be held to have legal effect simply as an appointment to fill the vacancy then existing, until the adjournment of the next session of the legislature, as the governor was not authorized to make an appointment for any longer time than during the recess of the legislature. (Pol. Code, sec. 1000.)

Upon the issuance of this commission, the appointment to fill such vacancy temporarily was complete, and needed no action of the senate to confirm it. (*People* v. *Cazneau,* 20 Cal. 504.) And under this commission the appellant was vested with the right to hold said office until the appointment and qualification of a successor in the mode provided by law. Section 879 of the Political Code declares: "Every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified"; and section 1000 of the Political Code does not create an exception to this rule, in the case of officers temporarily appointed by the governor. The language of that section, "but the person so appointed can only hold the office until the adjournment of the next session of the legislature," simply means, when construed with section 879, as it must be, that the term of such appointed officer *shall expire* upon the adjournment of the next session of the legislature, and his successor may take his place; but if no successor has been appointed, then the

very condition of affairs intended to be provided for by section 879 has arisen, and that section applies.

It is the settled law of this state that the mere expiration of the term of the incumbent of an office does not create a vacancy therein such as the governor alone is authorized to fill by the appointment of a successor. (*People* v. *Tilton,* 37 Cal. 614; *People* v. *Bissell,* 49 Cal. 407.)

It would follow, from this, that the appointment of the relator during a recess of the legislature was invalid, unless, under section 996 of the Political Code, a vacancy was created by the failure of the appellant to take and file his official oath after the confirmation of the senate. The obligation to take and file such oath did not arise unless the message of the governor announcing the appointment of appellant during the recess, and the action of the senate advising and consenting to the same, constituted an appointment of appellant as his own successor. But even construing these acts of the governor and senate as a nomination and confirmation of appellant as his own successor (and whether they can be so construed we do not determine), such appointment was not completed, no commission having been subsequently issued to the appellant. In the matter of an executive appointment with the consent of the senate, the issuance of a commission is not a mere ministerial act, but is a part of the act of appointment. It is this act which completes the appointment, as well as perpetuates the evidence of it. (*People* v. *Murray,* 70 N. Y. 526.) And this is also the doctrine of the case of *Conger* v. *Gilmer,* 32 Cal. 76.

It follows that the court below erred in rendering judgment for the relator upon the findings.

Judgment and order reversed.

SHARPSTEIN, J., BEATTY, C. J., HARRISON, J., GAROUTE, J., and MCFARLAND, J., concurred.

[No. 13995. Department One.—January 19, 1891.]

IN THE MATTER OF THE ESTATE OF CAVE J. COUTS, DECEASED.

ESTATES OF DECEASED PERSONS — SALE OF REALTY — PETITION OF CREDITOR OF EXECUTOR—NONSUIT.—Where a petition for the sale of the real estate of a decedent, presented by a creditor of the executor whose claim has been allowed by the court, states sufficient facts to justify the sale, and the petitioner introduces evidence tending to prove every material allegation of the petition, it is error to grant a nonsuit on motion of the devisees.

ID.—ALLOWANCE FOR SERVICES DURING ADMINISTRATION—PETITION OF CLAIMANT—NEGLECT OF EXECUTOR.—A claimant for services rendered to the estate during administration, whose claim has been allowed by the court as a proper expense of administration, may apply for a sale of the real estate to pay his claim, if the executor has not funds sufficient to pay it, and neglects to apply for the order of sale.

ID.—CONSTRUCTION OF CODE—CREDITORS OF EXECUTORS—EXPENSES OF ADMINISTRATION.—Sections 1536 and 1545 of the Code of Civil Procedure are intended to afford creditors of the executors as well as creditors of the decedent the means of securing payment of their claims against the estate, and contemplate expenses of administration which the executor neglects or refuses to pay.

ID.—UNPAID CLAIMS AGAINST EXECUTOR—SETTLEMENT OF ACCOUNT—JURISDICTION.—Claims against an executor for services rendered or materials furnished to the estate during administration need not be paid until they are allowed in the settlement of his account; but the court may determine, after notice to all persons interested, whether the estate is liable at all, and if so, in what amount.

ID.—SETTLEMENT OF EXECUTOR'S ACCOUNT—APPEALABLE ORDER.—An order settling the account of an executor is appealable.

ID.—CONCLUSIVENESS OF ALLOWANCE OF CLAIM—PETITION FOR SALE OF REALTY.—The allowance by the court of a claim for services rendered to an executor as part of the expenses of administration included in his account is conclusive against all parties interested, except those laboring under disability, if no appeal is taken from the order settling the account, and cannot be questioned by the devisees upon a petition for the sale of realty to pay the claim.

APPEAL from an order of the Superior Court of San Diego County granting a nonsuit.

The facts are stated in the opinion of the court.

Leovy & Humes, and *Conklin & Hughes,* for Petitioner and Appellant.

Hunsaker, Britt & Goodrich, and *Trippet & Neale,* for Contestants and Respondents.

Paterson, J.—On May 29, 1889, the executrix filed an account of her administration of the estate from January 29, 1887, to February 1, 1889, which set forth, among other items of the same nature, a claim of $1,240.57 against the executrix by Cave J. Couts, for services, money paid out, etc., "the validity of which charges *against said estate*" she asked the court to determine on the settlement of the account. After due notice, a hearing was had, and the account was settled. With respect to the item referred to, the court found that it was a legal charge against the estate, and authorized the executrix to pay Couts out of any moneys that might thereafter come into her hands as executrix. On March 5, 1890, Couts filed a petition asking for an order requiring the executrix to sell so much of the real estate as should be necessary to pay his claim. An order to show cause was issued, and at the trial the petitioner introduced evidence tending to support every material allegation of his petition, but on motion of the devisees, a nonsuit was granted, and the proceeding dismissed. From this order petitioner has appealed.

It is admitted that the court, in its decree settling the account, made the order referred to, and that the executrix has not paid, and has not funds in her hands sufficient to pay, petitioner the amount allowed; but it is claimed that the nonsuit and dismissal were proper, because the order of the court allowing Couts $1,240.57 is void; that his claim, if any he had, was against the executrix, and until she pays it and presents it in her account as an expense of administration, the court cannot act upon it; that the claim is barred by the statute of limitations, but if the appellant has any remedy at all, it is by execution against the executrix, under section 1647 of the Code of Civil Procedure.

We think that the petition states facts sufficient, and that upon the evidence offered by petitioner the motion for nonsuit should have been denied.

Section 1536 of the Code of Civil Procedure provides that "when a sale of property of the estate is necessary to pay . . . . the debts outstanding against the decedent, *or the debts, expenses, or charges of administration,* the executor may also sell any real as well as personal property of the estate *for that purpose,* upon the order of the court"; and section 1545 provides that "if the executor or administrator neglects to apply for an order of sale when it is necessary, any person may make application therefor, in the same manner as the executor or administrator, ... and the decree of sale must fix the period of time within which the executor or administrator *must make the sale.*" These provisions were intended to afford creditors of the executors, as well as creditors of the decedent, the means of securing payment of their claims against the estate, and necessarily contemplate expenses of administration which the executor neglects or refuses to pay.

There is nothing in the statutes which requires payment of claims against the executor for services rendered or materials furnished the estate during administration, before they can be allowed in the settlement of his account. It would be a misfortune if there were. Where the representative of the estate has a doubt as to the legality of the claim, or the amount that should be paid for services rendered or materials furnished in the course of administration, it is proper for his own protection, as well as for the protection of the heirs, that the court should determine, after notice to all persons interested, whether the estate is liable at all, and if so, in what amount. (*Dwinelle* v. *Henriquez,* 1 Cal. 392; *Gurnee* v. *Maloney,* 38 Cal. 88; 99 Am. Dec. 352.)

The order settling the account was appealable, and the allowance of the claim is conclusive against every

one interested, except those laboring under disability. (Code Civ. Proc., secs. 1637, 1638; *Deck's Estate,* 6 Cal. 669; *Estate of Stott,* 52 Cal. 406.)

The order appealed from is reversed, and the proceeding is remanded for a new trial.

HARRISON, J., and GAROUTTE, J., concurred.

[No. 13789. Department One.—January 19, 1891.]

H. EDWIN MOORE, APPELLANT, *v.* LONG BEACH DEVELOPMENT COMPANY, RESPONDENT.

DOUBLE APPEAL—STIPULATION IN TRANSCRIPT—STATEMENT ON MOTION FOR NEW TRIAL—AUTHENTICATION.—Where a double appeal is taken by one notice from a judgment, and an order denying a new trial, and the transcript contains a stipulation that "the appeal herein may be heard" on the record on appeal in the transcript, the statement upon motion for new trial may be looked into on the appeal from the order denying a new trial, and it cannot be objected that it is not identified as having been used upon the hearing of the motion.

INNKEEPERS—LIABILITY FOR LOSS OF BAGGAGE—ACCIDENTAL FIRE—GUESTS—BOARDERS.—Conceding, without deciding, that under the law of this state an innkeeper is an insurer of the goods of transient travelers or guests placed in the inn, against everything but the act of God or the public enemy, or the neglect or fraud of the owner of the property, the innkeeper is not liable to a boarded for the loss of baggage destroyed as the result of a purely accidental fire.

ID.—PLEASURE RESORT—RESIDENCE—RECEPTION OF FAMILY AS BOARDERS.—A family going to an inn at a pleasure resort to remain an indefinite time, which may be very prolonged, depending on the health of one of its members, and who have no other place of residence, and have previously made arrangements for board by the month at terms much lower than those for transient travelers, become boarders, and not mere transient travelers or guests.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion.

Scarborough & Waterman, and *Chapman & Hendricks,* for Appellant.

A guest is a traveler, wayfarer, or transient comer to an inn for lodging and entertainment. (*Curtis* v. *Murphy,* 63 Wis. 4; 53 Am. Rep. 242; *Calye's Case,* 8 Coke, 32; *Jolie* v. *Cardinal,* 35 Wis. 118; *Clute* v. *Wiggins,* 14 Johns. 175; 7 Am. Dec. 451, and note; 2 Kent's Com. 597; *Russell* v. *Fagan,* 8 Atl. Rep. 260 (Del.); *Walling* v. *Potter,* 35 Conn. 183.) The relation continues so long as the guest sojourns as a traveler, though a special price be agreed upon. (*Pinkerton* v. *Woodward,* 33 Cal. 557; 91 Am. Dec. 657; *Shoecraft* v. *Bailey,* 25 Iowa, 553; *Clute* v. *Wiggins,* 14 Johns. 175; 7 Am. Dec. 451, and note; *Beale* v. *Posey,* 72 Ala. 323; *Hancock* v. *Rand,* 17 Hun, 279; 94 N. Y. 1; 46 Am. Rep. 112; *Lusk* v. *Belote,* 22 Minn. 468; *Northcross* v. *Northcross,* 53 Me. 163; *Jolie* v. *Cardinal,* 35 Wis. 118; Schouler on Bailments, 256; *Ewart* v. *Stark,* 8 Rich. 423; *Hall* v. *Pike,* 100 Mass. 495; *Berkshire Woolen Co.* v. *Proctor,* 7 Cush. 417.) To constitute a boarder, there must be a special agreement for board and lodgings for a specified time, and he must not be a traveler. (*Neal* v. *Wilcox,* 4 Jones, 146; 67 Am. Dec. 267; *Hancock* v. *Rand,* 17 Hun, 279; 94 N. Y. 1; 46 Am. Rep. 112; *Bennett* v. *Miller,* 5 Term Rep. 273; *Horner* v. *Harvey,* (N. Mex. 1885); *McDaniels* v. *Robinson,* 26 Vt. 316; 62 Am. Rep. 589, and note; *Curtis* v. *Murphy,* 63 Wis. 4; 53 Am. Rep. 242.) A boarder must have his residence at the inn. (*Walling* v. *Potter,* 35 Conn. 183.)

Lee, Gardner & Scott, and *A. B. Hotchkiss,* for Respondent.

The record shows that the fire was purely accidental, and that plaintiff might have rescued his property, but failed to do so. This constitutes a defense, regardless of whether plaintiff was a boarder or a guest. (*Vaughn* v. *C. C. R. R. Co.,* 83 Cal. 22; Civ. Code, secs. 1852, 1859; *Hirshfield v. C. P. R. R. Co.,* 56 Cal. 484; *Merritt* v. *Clag-*

horn, 23 Vt. 177; *Treadwell* v. *Whittier,* 80 Cal. 583; 13 Am. St. Rep. 175.) Inevitable accident is a defense. (Brown's Legal Maxims, 5th ed., p. 393; *Hoffman* v. *Tuolumne Water Co.,* 10 Cal. 418; *Rodgers* v. *Central Pacific R. R. Co.,* 67 Cal. 609; Civ. Code, secs. 1836, 1839, 1852, 1859; *Vance* v. *Throckmorton,* 5 Bush, 45; 96 Am. Dec. 327; *Cutler* v. *Bonney,* 30 Mich. 263; Story on Bailments, 3d ed., secs. 465, 469; Jones on Bailments, 99, 107.) Whether a person is a guest or a boarder at an inn is a question of fact, in view of the circumstances. (*Hall* v. *Pike,* 100 Mass. 495; *Ness* v. *Stephenson,* 9 Q. B. 245; *McKeever* v. *Market Street R. R. Co.,* 59 Cal. 300; Schouler on Bailments, 256.) Plaintiff became an inhabitant or a resident of the place and a boarder at Long Beach. (Rapalje and Lawrence's Law Dict., tit. Boarder; *Berkshire W. Co.* v. *Proctor,* 7 Cush. 417, 425.)

Foote, C.—The respondent contends that the statement upon motion for a new trial which appears in the transcript cannot be looked into, for the reason that it is not *identified* as having been *used* upon the hearing of the motion.

There is but one notice of appeal, and that is, both as to the judgment, and the order denying a new trial. The stipulation at the end of the transcript is to this effect: "It is hereby agreed that the foregoing transcript contains a full, true, and correct copy of all papers necessary and proper to be used on this appeal; that the appeal herein was duly perfected, and the requisite deposit in lieu of an undertaking was given within the time prescribed by law; that the foregoing is a full, true, and correct transcript of the record on appeal, and that the appeal herein may be heard thereon."

If the word "appeal," as used in the stipulation, was intended to apply to both the order denying a new trial, and the judgment, then it covers the statement of the case which appears in the transcript, which is in due form,

and appears to have been *settled* by the judge, and *filed* on February 3, 1890. The order denying a new trial was made on the 17th of February, 1890.

It is plain that the appeal was taken from both order and judgment, and the stipulation evidently refers to them both, where the word "appeal" is used. Since the stipulation states that the "appeal herein may be heard" upon the record on appeal in the transcript, it is proper that the statement here, under all the facts appearing in the record, should be held as being one that can be looked into on the appeal from the order denying a new trial.

The main argument for the reversal of the judgment and order by the appellant seems to be that the evidence is insufficient to show that the plaintiff was a *boarder,* and not a *guest,* of the innkeeper who was sued, and the former contends that if a guest he is entitled to recover, but not as a boarder.

The case, as stated in the complaint, is that of an individual who goes to an inn as a guest or transient traveler and while he is there the inn burns down, and he loses his baggage, containing wearing apparel, jewels, and other personal valuables, occasioned by the negligence of the defendant and his servants, and seeks to make the innkeeper responsible for the loss. The fire appears to have been purely accidental, and there is nothing to show that the goods lost were not under the control of the owner, kept in his rooms, or that they were ever in the manual possession of the innkeeper.

Nor is it proved or found that the fire or loss occurred by any negligence of the defendant, its servants or agents. But the plaintiff contends that an innkeeper is an insurer of the goods of his guests placed in the inn, even as against loss by fire, as well as robbery and theft, and that if they are lost or injured while there, by any of these agencies, that the innkeeper must make good the loss.

It does not seem that any case, as to such a loss by fire, has been adjudicated by the appellate court of this state. But in *Mateer* v. *Brown,* 1 Cal. 221, 52 Am. Dec. 303, and in *Pinkerton* v. *Woodward,* 33 Cal. 600, 91 Am. Dec. 657, cases where the loss to the guest seems to have been occasioned by robbery, it was held that the innkeeper was an insurer of the property committed to his care, against everything but the act of God or the public enemy, or the neglect or fraud of the owner of the property.

Conceding, therefore, without deciding, that the view urged by the defendant is the law of this state upon the matter in hand, the real question for determination here is, whether the evidence shows the plaintiff to have been a *guest* or a *boarder.* Each case, as to this point, turns upon its special state of facts. There is no doubt in our minds, upon the facts here, that the plaintiff and his family were boarders whose time of remaining at their place of sojourn depended upon their own volition. They went to the inn to ascertain if it was a place where the health of the wife of the plaintiff would be benefited, with the determination to remain there indefinitely, perhaps for a *very long time,* if such should be the case. But with a view, if her health did not improve, to leave at any time. It was also shown that the plaintiff, before going there with his family, had made an arrangement for terms of entertainment at a great deal less than those for a transient traveler, and by the month, and they went prepared to stay, if they desired, for a considerable time, and to enjoy all the gayeties that might take place. They had no other place of residence, and for the time being this inn was to be such, subject, as to time of stay, to their volition, but at reduced rates of board by the month.

It was evidently the hope and the expectation of the plaintiff and wife that her health would be benefited at this inn, which was a pleasure resort, its principal busi-

ness season being that of the summer. And it is fair to presume that they thought it would benefit her, and went prepared to stay as permanent boarders, rather than transient travelers. These facts were known to the defendant, and with this idea in the minds of both the contracting parties, together with the fact that the plaintiff had just been boarding at another inn, at another place, and had left there some of his goods, such as he did not expect to need at the defendant's inn, and had no fixed home, and that he got reduced terms of board, and did not place his valuables in the care of the innkeeper, are very persuasive that it was the intention of all the parties that he should be a boarder, and not a mere transient traveler or guest, and, for the time being, a resident of the place where he was intending to board. Under these facts, and others appearing in the record, we cannot say that the findings of the court below are not sufficiently supported by the evidence.

We therefore advise that the judgment and order be affirmed.

BELCHER, C., and HAYNE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

[No. 13898. Department Two.—January 19, 1891.]

N. C. SMITH, RESPONDENT, *v.* G. F. MOHN, SEN., APPELLANT.

VENDOR AND PURCHASER—CONTRACT OF SALE—EXECUTION—FINDINGS—EXHIBIT—SURPLUSAGE.—If a contract for the purchase of land is set out *in hæc verba* in the complaint, a finding that the vendor entered into an agreement in writing with the vendee for the sale of the land upon the terms and conditions set forth in the complaint is a sufficient finding that the vendee executed the contract; and a further reference in the findings to an exhibit, which is not made a part of the pleadings, findings, or record, may be rejected as surplusage.

ID.—FINDINGS—AMOUNT DUE UPON CONTRACT.—A finding of the amount due the vendor upon the contract is sufficient, without stating that it was due from the vendee, where the vendor and vendee are the only parties who signed the contract.

ID.—FRAUD—PURCHASE BY THIRD PARTY—AFFIRMATIVE DEFENSE—SUFFICIENCY OF FINDINGS.—Affirmative matter, alleged in the answer, that the vendee's signature to the contract was obtained by fraud, and that a third party was the purchaser and the real party in interest, and was so accepted and regarded by the vendor, is sufficiently met and covered by a finding that the signature was not obtained by fraud, and that the vendor did not accept and receive the contract with knowledge and notice that the third party was the real purchaser.

ID.—PLEADING—PERFORMANCE OF CONDITIONS PRECEDENT.—An averment that the vendor duly performed all of the conditions of the contract to be performed by him up to the time of bringing suit is a sufficient averment of the performance of conditions precedent.

ID.—TIME OF ESSENCE OF CONTRACT—DEFAULT OF VENDEE—ACTION FOR PURCHASE-MONEY.—Under a contract for the sale of land, providing that time shall be of its essence and that a failure on the part of the vendee to comply with its terms shall forfeit all his rights thereunder, the failure of the vendee to make the payments provided for does not make the contract void as to the vendor, and he may, upon default of the vendee, enforce the contract, and sue for the amount of purchase-money due.

FINDINGS — ULTIMATE FACTS.—Findings should respond to and cover all material issues raised by the pleadings, but they should be statements only of ultimate and not of probative facts, and will be held sufficient where all the material ultimate facts are passed upon.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

Brunson, Wilson & Lamme, for Appellant.

There is no finding as to whether or not appellant executed the contract set forth in the complaint; he admits having signed it, but denies that he ever entered into it. "Entering into it" is equivalent to signing, sealing, and delivering, and means something more than the mere signing. (*Bagley v. McMickle,* 9 Cal. 430; *Ricketts* v. *Harvey,* 78 Ind. 153; 1 Bouv. Law Dict. 494.) Nor is there any finding as to the terms and conditions upon which the sale was made. It is true, the court finds that appellant agreed to purchase the land upon the terms and conditions set forth in the complaint and in exhibit No. 2, but this exhibit is not made a part of the pleadings, findings, or record, or referred to, except in this manner; and while it is a well-settled rule that findings may refer to the pleadings for facts without setting them out, it can only do so where those facts are sufficiently stated in the pleadings. (*McEwen* v. *Johnson,* 7 Cal. 258; *Spaulding* v. *Wesson,* 84 Cal. 141.) The findings do not embrace all of the material issues of the pleadings. Findings must respond to and embrace every material issue raised by the pleadings, including the affirmative matter set up in the answer, even though no evidence be introduced in support thereof. (*Schroeder* v. *Jahns,* 27 Cal. 280; *People* v. *Forbes,* 51 Cal. 628; *People* v. *Fuqua,* 61 Cal. 377; *Swift* v. *Canavan,* 52 Cal. 417; *Billings* v. *Everett,* 52 Cal. 661; *Mahoney* v. *Braverman,* 54 Cal. 565; *Cassidy* v. *Cassidy,* 63 Cal. 353; *Phipps* v. *Harlan,* 53 Cal. 87; *Baggs* v. *Smith,* 53 Cal. 88.) If the respondent desired to enforce the contract as against appellant, after the first day of May, 1888, he should, prior to the time, have tendered the deed and demanded the payment of the balance of the purchase price, but failing in this, he was in default, and no tender thereafter could give him any right of action as against the appellant. (*Cleary* v. *Folger,* 84 Cal. 316; *Grey* v. *Tubbs,* 43 Cal. 362; *Magee* v. *McManus,* 70 Cal. 554.) The cove-

nants of the contract are mutual and dependent, and in order to enable respondent to maintain this action, it must be shown that he performed, or offered to perform, all the terms and conditions of the contract within the time specified. (*Hill* v. *Grigsby,* 35 Cal. 656; *S. S. & L. S.* v. *Hildreth,* 53 Cal. 721; *Englander* v. *Rogers,* 41 Cal. 420; *Bohall* v. *Diller,* 41 Cal. 532; *Kelly* v. *Mack,* 45 Cal. 303; *Shinn* v. *Roberts,* 1 N. J. L. 435; 43 Am. Dec. 636.)

Jay E. Hunter, and *Dunn & Hunter,* for Respondent.

As appellant does not deny the terms of the contract, but admits signing it, this is an admission of the terms of the contract. As the terms are admitted, no finding on that subject was necessary. (*Swift* v. *Maygridge,* 8 Cal. 445; *Fox* v. *Fox,* 25 Cal. 588; *Grossini* v. *Perazzo,* 66 Cal. 545; *Pomeroy* v. *Gregory,* 66 Cal. 572; *Walker* v. *Brem,* 67 Cal. 599; *Taylor* v. *Central Pac. R. R. Co.,* 67 Cal. 615.) The court found that the parties executed a contract, and it also found the terms and conditions of sale. There is no basis for the presumption that appellant did not agree to purchase the lot upon the terms and conditions set forth, as a presumption cannot be made contrary to a fact found, nor of facts outside the issues. (*Bernal* v. *Gleim,* 33 Cal. 668–676; *Gifford* v. *Carvill,* 29 Cal. 589–596.) As the fact of indebtedness of appellant to respondent results by necessary inference from the finding that money was due to respondent upon the contract, and that appellant was the only other party to the contract, and the only defendant in this action, the fact of such indebtedness of appellant to respondent will be treated as found. (*Pacific Mutual Ins. Co.* v. *Stroup,* 63 Cal. 150–154; *Joseph* v. *Dougherty,* 60 Cal. 358; *Osborne* v. *Clark,* 60 Cal. 622; *Davis* v. *Baugh,* 59 Cal. 568–576.) The findings embrace every material fact put in issue by the pleadings. The failure to find on an immaterial issue tendered by the pleadings is not error. (*Knowles* v. *Seale,* 64 Cal. 377; *Roberts* v. *Haley,* 65 Cal.

402.) If the court, in its findings, does not expressly find on an issue made, it will be presumed that the finding on such issue was in favor of the party who prevailed in the action. (*Lovell* v. *Frost,* 44 Cal. 471.) The allegation in the complaint that plaintiff has "duly performed all of the conditions of said contract to be performed by him up to this time, and has been constantly, and now is, ready and willing, and prior to the institution of this suit offered," is not denied by the answer, and is therefore not one of the issues in the case. No finding on this question was necessary, and the finding which was entered may be treated as surplusage. (*Swift* v. *Muygridge,* 8 Cal. 445; *Fox* v. *Fox,* 25 Cal. 588; *Grissini* v. *Perazzo,* 66 Cal. 545; *Walker* v. *Brem,* 67 Cal. 599; *Pomeroy* v. *Gregory,* 66 Cal. 572; *Taylor* v. *C. P. R. R. Co.,* 67 Cal. 615.) In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part. (Code Civ. Proc., sec. 457.) As to the form of allegations showing performance, an allegation that the plaintiff has "fully performed," on his part, all conditions of the contract, is sufficiently explicit. (*California Steam Nav. Co.* v. *Wright,* 6 Cal. 258; 65 Am. Dec. 511; *People* v. *Jackson,* 24 Cal. 630; *People* v. *Holladay,* 25 Cal. 303; *Rhoda* v. *Alameda Co.,* 52 Cal. 350; *Himmelman* v. *Danos,* 35 Cal. 441–448; *Ferrer* v. *Home Mutual Ins. Co.,* 47 Cal. 416–431; *Griffiths* v. *Henderson,* 49 Cal. 566–570; *Blasingame* v. *Home Ins. Co.,* 75 Cal. 633–638; *Moritz* v. *Lavelle,* 77 Cal. 10–12; 11 Am. St. Rep. 229; *Cowan* v. *Phœnix Ins. Co.,* 78 Cal. 181; Bliss on Code Pleading, sec. 301, ed. of 1879.)

BELCHER, C.—This action was commenced on the nineteenth day of April, 1889, to recover the sum of one thousand dollars, with interest thereon, alleged to be due

from defendant to plaintiff under a contract for the sale of land.

It is alleged in the complaint that on the sixth day of September, 1887, the plaintiff and defendant entered into a written agreement, a copy of which is set out in full, whereby the plaintiff, as party of the first part, agreed to sell and convey to the defendant, as party of the second part, and the latter to buy, a certain described parcel of land for the sum of two thousand two hundred dollars, to be paid as follows: Seven hundred dollars cash, the receipt of which was acknowledged, five hundred dollars on January 1, 1888, and the balance of one thousand dollars on May 1, 1888, with interest at eight per cent.

It is further alleged that the first two payments were made, and that the sum of one thousand dollars, with interest, "became due, according to the terms of said contract, on the first day of May, 1888, no part of which has been paid by defendant, although often requested so to do; that plaintiff has duly performed all of the conditions of said contract to be performed by him to this time, and has been constantly, and now is, ready and willing, and prior to the institution of the suit offered, to execute and deliver to defendant a deed of said premises, together with a certificate of title, upon compliance by defendant with the terms of said contract as therein set forth, but defendant said he would not accept a deed, and refused to pay said money."

The agreement set out contains this provision: "It is further agreed that time is of the essence of this contract; and in the event of a failure to comply with the terms hereof by said party of the second part, the said party of the first part shall be released from all obligations in law or equity to convey said property, and said party of the second part shall forfeit all right thereto, and to moneys theretofore paid under this contract, and all his interest in or to said moneys or said property

shall thereupon immediately cease as fully as if said moneys had never been paid or this agreement entered into. And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed, with certificate of title."

The defendant, by his answer, denied that "plaintiff and defendant entered into the written agreement, a copy of which is set out in the complaint," admitted that he signed it, and averred "that his signature thereto was obtained by false and fraudulent representations of the said plaintiff, made by and through his agents employed by him for the sale of said premises in said contract described." He then states that he was solicited by one C. J. Longstreet to purchase the property, and declined to do so; that Longstreet and D. G. White, his partner in the real estate agency business, informed him that they had contracted to purchase the property in his, defendant's, name, and had paid on account of the purchase price a sum of money which they claimed to have advanced for him; that he then and there refused to confirm the purchase or to take the property, whereupon they produced the written contract, a copy of which is set out in the complaint, and which had then been signed by the plaintiff, and insisted that he should execute it and become the purchaser of the property, and that he positively refused to make the purchase or sign the contract; that upon such refusal they informed the agent of plaintiff for the sale of the property that defendant refused to sign the contract, and offered to return the same to the agent and cancel it, and demanded a return of the money paid by them on account thereof, but the agent refused to receive or cancel the contract or to repay the money; that thereupon it was agreed between them that White should become the purchaser, procure the signature of defendant to the contract, and

take an assignment thereof, and pay the balance of the purchase price; that Longstreet and White informed defendant of this agreement, and requested him to attach his signature to an assignment indorsed on the contract to White, and that he at first refused, but finally did it upon their assurance that it was a mere matter of form, and that he would incur no liability thereunder; that subsequently, upon like request and assurance, he signed the contract; that the plaintiff thereafter received the contract, and the first and second payments therein provided for, with full knowledge and notice that White was the purchaser of the property, and the real party in interest as the vendee thereof; and that the plaintiff did not at any time call upon defendant for any money or to comply with any of the terms of the contract, until after White had made default in the last payment, and that defendant never did make any payment for or on acocunt of the said purchase, or furnish any money therefor.

The case was tried, and the findings of the court were as follows: 1. That on the sixth day of September, 1887, the plaintiff, being the owner of the parcel of land described, "entered into an agreement in writing with the defendant, G. F. Mohn, Sen., whereby the plaintiff agreed to sell and the defendant agreed to buy said land upon the terms and conditions set forth in plaintiff's complaint and the exhibit marked 'Plaintiff's Exhibit No. 2'"; 2. That Longstreet and White were not the agents of plaintiff, or employed by him for the sale of the said premises; 3. That the signature of the defendant to the said agreement of purchase and sale was not obtained by false and fraudulent representations of the plaintiff, made by and through his agents; 4. That plaintiff did not accept and receive the contract, or the first and second payments thereon, with the knowledge and notice that White was the purchaser of the property, or the real party in interest as the vendee thereof; 5. That the

plaintiff, prior to the institution of this suit, offered to execute and deliver to defendant a deed of the premises, together with a certificate of title, and demanded of him the balance due on the contract, but defendant declined to accept the deed, and refused to pay the money; 6. That there is now due the plaintiff upon said contract the sum of $1,167, principal and interest.

The court gave judgment for the plaintiff for the amount found due, with costs, and the defendant appealed.

It is contended for appellant that the findings were defective and insufficient in several particulars.

1. It is claimed that there was no sufficient finding that defendant ever executed the contract set forth in the complaint, or as to what were the terms and conditions upon which the sale was made. This position is rested upon the last clause of the first finding, that the parties entered into an agreement to sell and buy the land upon the terms and conditions set forth in the complaint, *and* the exhibit marked "Plaintiff's Exhibit No. 2." It is said that this exhibit is not made a part of the pleadings, findings, or record, and is not referred to, except in this manner. But the contract of sale was set out *in hæc verba* in the complaint. The defendant admitted that he signed that contract, and only alleged, in substance, that he did not execute it in a legal sense, for the reason that his signature was obtained by fraud. There is no question, therefore, as to what were the terms and conditions of the contract which the defendant signed, and on which the plaintiff relied for a recovery. The only question, then is, Was the defendant bound by the contract? or not bound by it, because of the alleged fraud? The words "and the exhibit marked 'Plaintiff's Exhibit No. 2,'" may be rejected as surplusage, as the finding is complete without them. It may be remarked, in this connection, that the evidence is not brought up in the record, and we are not advised as to

what was introduced, but, if need be, we might assume that plaintiff offered his contract and it was received and marked as his "Exhibit No. 2."

It is next objected that the court found only the amount "due the plaintiff upon said contract," and not that the sum named was due from defendant. But as the plaintiff and defendant were the only parties who signed the contract, it must follow as a necessary inference, in view of the other findings, that if anything was due the plaintiff it was due from the defendant. We think therefore that this finding was sufficient.

It is further objected that the findings as to the affirmative matters set up in the answer were not sufficient. The substance of these matters is: 1. That defendant's signature to the contract was obtained by fraud, consisting of false and fraudulent representations, etc.; 2. That White was the purchaser and the real party in interest, and was so accepted and regarded by the plaintiff.

It is true that findings should respond to and cover all of the material issues raised by the pleadings, but they should be statements only of the ultimate facts, and not of the probative facts. (*Mathews* v. *Kinsell,* 41 Cal. 512.) In this case we think the findings did meet and negative all the ultimate facts affirmatively alleged in the answer, and that they should be held sufficient.

It is also contended that, under the rule that pleadings are to be construed most strongly against the pleader, the averment in the complaint that plaintiff, "prior to the institution of this suit, offered to execute and deliver to defendant a deed of said premises, together with a certificate of title, upon compliance," etc., must be construed as relating to a time immediately preceding the institution of the suit; that the offer of a deed and demand of payment were therefore not made until nearly eleven months after the money sued for became due and payable; and that plaintiff, by his neglect to tender the deed and demand payment when the money

became due, had lost all right to sue for and recover the money under the express provisions of the contract. The provisions of the contract relied upon as affecting this result are those above quoted.

It will be observed that it is also averred in the complaint "that plaintiff has duly performed all of the conditions of said contract to be performed by him to this time." This was a sufficient averment of the performance of conditions precedent (Code Civ. Proc., sec. 457), and it is not denied by the answer. This being so, how can it be said that plaintiff was in default, and thereby lost his rights?

But however this may be, it should be noticed that the substance of the provisions relied upon is, "that time is of the essence of the contract; and if defendant shall fail to comply with its terms, then the plaintiff shall be released from all obligations to convey the property, and defendant shall forfeit all right thereto and to the moneys paid, and all his interest in or to the said moneys and property shall immediately cease as fully as if the moneys had never been paid or the agreement entered into."

In this there is no provision that the plaintiff shall forfeit his rights if the money is not paid on time; and in *Wilcoxson* v. *Stitt,* 65 Cal. 96, 52 Am. Rep. 310, where a similar contract was under review, it was held that the failure of the vendee to make the payments provided for did not make the contract void, so far as the vendor was concerned, but that he had the option to avoid or enforce the contract, and might, if he elected to do so, sue for and recover the balance of the purchase-money.

That case seems to be decisive of this; and as the above are all the points made for a reversal, we advise that the judgment be affirmed.

VANCLIEF, C., and HAYNE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 13856. Department Two.—January 19, 1891.]

THE CITY OF SAN LUIS OBISPO, RESPONDENT, *v.* B. F. PETTIT, COUNTY TREASURER, ETC., APPELLANT.

TAXES—REASSESSMENT—POLITICAL CODE.—Section 3649 of the Political Code, providing for the reassessment of property which has "escaped assessment" in the preceding year, is not unconstitutional.

ID.—WORD "ASSESSMENT.—The word "assessment," as used in said section, means a valid assessment.

ASSESSMENT—VALIDITY—COMPLIANCE WITH STATUTE—MONEY PAID INTO COURT.—An assessment which is not made as prescribed by the statute is invalid. Therefore, if the statute requires money paid into court and deposited with the county treasurer to be assessed to such treasurer, and it is assessed to the plaintiff in the suit, the assessment is invalid.

MUNICIPAL CORPORATION ACT—TIME OF ASSESSMENT—ADOPTION OF SYSTEM BY CITY COUNCIL.—Section 871 of the municipal corporation act, which provides that the city council may adopt a system for the assessment, levy, and collection of taxes, which shall conform to the general laws of the state as nearly as circumstances will permit, "except as to the times for such assessment, levy, and collection," does not forbid the council from selecting the time fixed for the other taxes. It simply leaves the selection of the time to the discretion of the council.

MEANING OF WORDS "ASSESSING AND COLLECTING."—The words "assessing and collecting" may be so used as to include the operation called the levy of the tax.

MUNICIPAL ORDINANCE—ADOPTION OF SECTIONS OF CODE BY REFERENCE TO THEIR NUMBER.—An ordinance passed in pursuance of section 871 of the municipal corporation act may adopt certain sections of the Political Code by reference to their number.

ORDINANCE—INVALIDITY OF PART.—If part of an ordinance is invalid, but is distinctly separable from the remainder, such remainder may stand, and the invalid portion may be rejected.

APPEAL from a judgment of the Superior Court of San Luis Obispo County, and from an order refusing a new trial.

The facts are stated in the opinion.

Graves, Turner & Graves, for Appellant.

William Shipsey, for Respondent.

HAYNE, C.—This was an action to recover delinquent taxes. The property taxed was a sum of money depos-

ited with the defendant in his official capacity, under an order of the superior court, in a pending case. During the fiscal year 1887–88, the defendant reported the deposit to the assessor, who, however, did not assess it to him, but (probably acting under a mistaken view of the law) assessed it to the plaintiffs in the suit. The tax was not paid. In the following year the property was assessed to the defendant. But upon the theory that it had "escaped assessment" the preceding year, the amount of the assessment was doubled. The trial court gave judgment for the plaintiff, and the defendant appeals. The points made relate to the validity of the assessment.

1. In doubling the assessment, the assessor acted under a provision of the Political Code which is as follows:—

"Sec. 3649. Any property discovered by the assessor to have *escaped assessment* for the last preceding year, if such property is in the ownership or under the control of the same person who owned or controlled it for such preceding year, may be assessed at double its value."

The validity of this provision was affirmed in *Biddle* v. *Oaks,* 59 Cal. 95, in which case the court said that the legislature had power to impose a penalty for neglect to have an assessment made. In the case before us, there was no such neglect, because the defendant reported the property to the assessor. But we do not understand the decision as confining the operation or validity of the provision to cases where there has been neglect on the part of the person to whom the assessment is made. The terms of the provision indicate no such limitation. The language is general, and applies to all cases where property has escaped assessment in the preceding year, whatever may have been the cause of such escape.

Nor do we think that upon this construction the provision is invalid. Its evident purpose is to carry out

the general intention pervading the revenue system, that all private property shall bear its share of the burden of taxation. This is certainly a legitimate purpose, and the means employed to carry it out are not, in our opinion, in violation of any constitutional provision. The section does not provide that the property shall not be assessed in proportion to its value. It provides, in effect, that in certain cases assessments for two different years may be made in one, and therefore goes, in effect, merely to the time at which an assessment may be made. We see no constitutional objection to this. It is true that in exceptional cases it might happen that the property would increase or decrease in value since he preceding assessment, and hence that merely doubling the assessment would not be an accurate way of arriving at the value for the preceding year. But in the great majority of cases, doubling the assessment would be a fair enough way of arriving at a valuation for the preceding year.

And if in exceptional cases the method would result in an overvaluation, and it be assumed (for the purposes of the opinion) that in such cases the overvaluation would render the assessment void, it would have to be shown that the case was of such exceptional character. In this case no such question can arise, because the property assessed was money; and for all practical purposes was of the same value from year to year. The provision, therefore, is valid, and covers the case before us.

It is to be observed that the condition of the double assessment is not that the property should have escaped *taxation.* It is not enough, therefore, to show that the tax was not paid. The property must have escaped "assessment." But, in our opinion, the word "assessment," in this connection, means a *valid* assessment. A thing which has the semblance of an assessment, but which is void and of no effect, is for all practical purposes no assessment, and furnishes no reason why a proper assessment should not be made. The question therefore must

turn upon whether the assessment for the year 1887–88 was valid or invalid.

In our opinion it was invalid. The method of making an assessment in such a case as this is prescribed by the following provision of the Political Code:—

"Sec. 3647. Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court."

There was a plain violation of the provision of this section, and the well-established rule is, that if an assessment is not made as prescribed by the statute, it is void. (*Grotefend* v. *Ultz,* 53 Cal. 666; *Grimm* v. *O'Connell,* 54 Cal. 522; *Hearst* v. *Egglestone,* 55 Cal. 367; *Brady* v. *Dowden,* 59 Cal. 51; *Bosworth* v. *Webster,* 64 Cal. 1; *Daly* v. *Ah Goon,* 64 Cal. 512; *Klumpke* v. *Baker,* 68 Cal. 559.) It is true that the code provides that "no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid." (Pol. Code, sec. 3628.) But whatever may be the meaning of this provision, it does not apply to personal property. (*Lake County v. S. B. Q. M. Co.,* 66 Cal. 17.)

The assessment for 1887–88 was therefore invalid, and a reassessment in the following year was proper.

2. It is contended that there was no authority of law for making the levy.

Section 871 of the municipal corporation act provides that the city trustees "shall have power, and it shall be their duty, to provide by ordinance a system for the assessment, levy, and collection of all city or town taxes not inconsistent with the provisions of this chapter, which system shall conform, as nearly as the circumstances of the case may permit, to the provisions of the laws of this state in reference to the assessment, levy, and collection of state and county taxes, *except as to the time for such assessment, levy, and collection.*" (Laws 1883, p. 273.)

The ordinance passed in pursuance of the above provision contained, among other things, the following:—

"Sec. 3. The manner, form, and time of *assessing and collecting* city taxes shall be the same as is prescribed by the Political Code of the state of California for assessing and collecting state and county taxes; and all the provisions of title 9 of part 3 of said Political Code are hereby adopted, and are ordained to be, and are, the law for *assessing and collecting* city taxes, as to manner, mode, and time," etc.

The objection consists of two branches, which we shall consider separately.

(*a*) It is argued that the statute above quoted *forbids* the city from assessing, levying, and collecting its taxes at the same time as the state and county. But we do not so construe the provision. It simply leaves those matters to the discretion of the city trustees, who may fix any time they see fit. There is nothing to prevent them from selecting the time fixed for the other taxes.

(*b*) It is said that the ordinance in question provides only for "assessing and collecting" the taxes, and not for levying them, as to which it is contended that no provision is made.

But in the first place, we think that the words "assessing and collecting" are used in the ordinance in a general sense, and include the operation called levying the tax. The words are so used in the constitution. As is said in the clear and satisfactory argument of the counsel for the respondent: "The foundation of the city taxing power is in the constitution. Article 11, section 12, provides that 'the legislature . . . . may by general laws vest in the corporate authorities power to *assess* and *collect* taxes.' There is no authority to 'levy' unless one of the words 'assess and collect' includes levy."

In the second place, the ordinance does not confine itself to an adoption of the provisions of the code by a general reference to them as those in relation to the

assessment and collection of taxes. It goes on to designate specifically the provisions adopted, by saying: "And all the provisions of title 9, part 3, of said Political Code are hereby adopted." The part of the code so designated contains provisions for levying the tax (Pol. Code, secs. 3713–3719), and the ordinance makes provisions for the difference in officers, etc.

3. It is contended that the provisions of the ordinance quoted conflict with section 879 of the municipal corporation act. The section referred to provides, in substance, that the delinquent taxes shall be collected by the city attorney by suit in the name of the city (Laws 1883, p. 277), while the portions of the Political Code adopted by the ordinance provide that such taxes shall be collected by the tax collector by sale of the property. (Pol. Code, secs. 3765 et seq.) But if it be conceded that these portions of the ordinance are in conflict with the statute (as to which see *City of Placerville* v. *Wilcox,* 35 Cal. 21), it does not follow that the whole ordinance is void. "Nothing is better settled than that if the part of a law of ordinance which is invalid is distinctly separable from the remainder, the latter can stand and the former be rejected." (*Ex parte Christensen,* 85 Cal. 212.) The provision for the collection of the delinquent taxes seems distinctly separable from the other parts of the ordinance, and may therefore be rejected. The proceedings in this case were in accordance with the statute, the suit having been brought under section 879, above referred to.

In the view we have taken, it is not necessary to consider the effect of the amended ordinance.

We therefore advise that the judgment and order appealed from be affirmed.

BELCHER, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

DE HAVEN, J., concurring.—I concur in the judgment and in the foregoing opinion. The money which was the subject of the double assessment for the year 1888–89 did not bear its share of taxation for the preceding year. If the owner had waived the invalidity of its assessment for the fiscal year 1887–88, and had paid upon such assessment the tax levied for that year, a different question would have been presented.

[No. 13808. Department Two.—January 21, 1891.]

N. H. BALL, RESPONDENT, *v.* PETER KEHL, APPELLANT.

WATER RIGHTS—APPROPRIATION FOR SPECIAL USE—RIGHTS OF SUBSEQUENT APPROPRIATOR—TEMPORARY DIVERSION—INJUNCTION—INSUFFICIENT FINDINGS.—In an action by a subsequent appropriator of water for purposes or irrigation and domestic use, to restrain its diversion when not needed by a prior appropriator for mill purposes, an allegation that the defendant was continuing, and that he threatened to continue, to divert the water, when not needed for mill purposes, is material; and a finding that on a certain day the defendant deprived the plaintiff of the use of the water is insufficient to sustain an injunction, without a finding as to how long the deprivation continued, or as to whether the defendant threatened to continue it.

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Willis & Cole, Curtis & Otis, and *Henry M. Willis,* for Appellant.

H. C. Rolfe, for Respondent.

DE HAVEN, J.—The complaint alleges, in substance, that the defendant had by means of a canal appropriated the waters of a certain creek for the purpose of

operating a mill owned by him, and that, subject to the use and right to use said water by the defendant, the plaintiff has for twelve years last past appropriated and used adversely to defendant, for irrigation, agricultural, and domestic purposes, the water so flowing in said canal whenever the said mill was not being run; that upon August 10, 1888, while the said mill was not running, the defendant without right deprived plaintiff of the use of said water, and has ever since continued to deprive plaintiff of its use; and that "defendant threatens so to deprive plaintiff of the use of any of said water at all times, even when said mill is not being run or operated, nor said water needed for running or operating the same." The answer of the defendant contained a denial of these allegations.

The court below rendered judgment in favor of the plaintiff, and enjoining the defendant from depriving plaintiff of the use or flow of the water of said canal except at such times as said water may be needed and actually used for running and operating said mill.

From this judgment, and an order denying his motion for a new trial, the defendant appeals.

The findings do not support the judgment. The court finds that the defendant did on the 10th of August, 1888, and while he was not using the water for the operation of his mill, deprive the plaintiff of the use of said water by closing a certain wastegate; but there is an entire omission to find how long such deprivation continued, or whether defendant ever threatened or threatens to continue so to deprive plaintiff of the use of said water at times when said mill is not being run, or needed for running the same. The allegation that defendant's act was continuing, and that he threatened to continue to deprive plaintiff of all use of the water in controversy, was a material one. Without it, the complaint would not state facts sufficient to entitle plaintiff to the injunction asked for and obtained, and the failure of the court to

find upon this issue tendered by the complaint is necessarily fatal to the judgment. This conclusion is sustained by the case of *Coker* v. *Simpson,* 7 Cal. 340, in which it was said:—

"The complaint seems insufficient to sustain that part of the judgment granting the injunction. It is simply alleged, in substance, that defendants, between certain specified dates, diverted the waters of the stream, to the plaintiff's damage in a sum stated. There is no allegation that the injury was continuing, or threatened to be continued, or likely to be continued. The circumstances stated are sufficient for a recovery of damages, but no equitable facts are alleged to sustain the injunction. The writ of injunction, though remedial, must be based upon equitable circumstances. From all that appears in the complaint, the injury was only temporary, and not likely to continue."

And so in this case, it may be said, from all that appears in the findings of the court, plaintiff's injury was only temporary and past, and not likely to continue at any time in the future. (See also *Tuolumne Water Co.* v. *Chapman,* 8 Cal. 392.)

This view renders it unnecessary to pass upon the sufficiency of the evidence to sustain the findings of the court, as the reversal of the judgment compels a reversal of the order denying defendant's motion for a new trial.

Judgment and order reversed.

McFARLAND, J., and SHARPSTEIN, J., concurred.

[No. 14063. In Bank.—January 21, 1891.]

A. P. HARLAN ET AL., RESPONDENTS, *v.* J. H. STUFFLEBEEM ET AL., APPELLANTS.

MECHANIC'S LIEN—SUBSTANTIAL PERFORMANCE OF CONTRACT—FINDINGS—INCONSISTENCY.—In an action to foreclose a mechanic's lien for painting, varnishing, and graining a building, findings that some small places in the house were not properly grained and finished, and that the cost of properly finishing them would be not more than five dollars, are not inconsistent with a finding that the plaintiff substantially performed his contract.

ID.—SUBSTANTIAL PERFORMANCE SUFFICIENT — RECOUPMENT FOR SLIGHT OMISSION — RIGHT OF ACTION.—In contracts for the construction or repair of buildings, a substantial performance is sufficient to entitle the contractor to compensation for the work done under the contract; and if there is an omission or imperfection so slight that it cannot be regarded as an integral or substantive part of the original contract, and the owner can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action, especially where the owner has received the benefit of what has been done.

ID.—TRIVIAL IMPERFECTION.—A trivial imperfection in the work cannot prevent the filing or foreclosure of a lien by the contractor for the work done by him under the contract.

CONTRACT—SUBSTANTIAL PERFORMANCE—QUESTION OF FACT—FINDING.—Whether a contract has been substantially performed is a question of fact to be determined from the facts and circumstances of the case, and a finding of the trial court thereon is as conclusive as upon any other question of fact.

MECHANIC'S LIEN—CONTRACT WITH LESSEE—INTEREST OF OWNER—FAILURE TO GIVE NOTICE.—The interest of the owner in lands leased is subject to a lien for materials used in the construction of a building thereon, erected under a contract by the lessee, if the owner fails to give notice that he will not be responsible for the same.

APPEAL from a judgment of the Superior Court of Tulare County.

The facts are stated in the opinion of the court.

Brown & Daggett, for Appellants.

Before one party to an obligation can require another to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself, and must be able and offer to fulfill all conditions concur-

rent imposed upon him on the like fulfillment by the other party. (Civ. Code, sec. 1439; *Oakley* v. *Morton,* 11 N. Y. 25; 62 Am. Dec. 49; *Carpenter* v. *Stevens,* 12 Wend. 589; *Moakeley* v. *Riggs,* 19 Johns. 69; 10 Am. Dec. 196; *Paige* v. *Ott,* 5 Denio, 406; *Smith* v. *Briggs,* 3 Denio, 73; *Smith* v. *Brady,* 17 N. Y. 173; 72 Am. Dec. 442; *Baker* v. *Higgins,* 21 N. Y. 397; *Glacius* v. *Black,* 50 N. Y. 145; *Millard* v. *Morse,* 32 Pa. St. 506; *Lassing* v. *Page,* 51 Cal. 575; *Twomey* v. *People's Ice Co.,* 66 Cal. 233.) The findings as to the completion of the work are contradictory. Contradictory findings are not sufficient to support a judgment. (*Reese* v. *Corcoran,* 52 Cal. 495; *Sloss* v. *Allman,* 64 Cal. 47; *Weaverville W. R. Co.* v. *Supervisors,* 64 Cal. 70; *Kerns* v. *McKean,* 65 Cal. 411.) The judgment is void as to the owners in fee of the land, as the lien on the land is expressly limited to the interest owned therein by the person who caused said building, improvement, or structure to be constructed, altered, or repaired. (Code Civ. Proc., sec. 1185.)

Lamberson & Taylor, and *Charles G. Lamberson,* for Respondents.

The laborer is entitled to have a lien for the value of his labor, regardless of the question of contract. The lien law of this state provides that laborers of every class performing labor upon any building, etc., shall have a lien upon the property "for the value of such labor done." (Code Civ. Proc., sec. 1183.) And the constitution provides, in effect, for the same thing. (Const., art. 20, sec. 15.) The performance of a building contract need not in all cases be literal and exact, to enable the contractor to recover the consideration due upon performance. If, acting in good faith, he substantially performs the work, he may recover, notwithstanding slight or trivial defects for which compensation can be made by an allowance to the other party; and whether or not a contract has been so performed is a question of

fact to be determined by all the circumstances of the cases. (*Holmes* v. *Wood,* 88 N. Y. 650.) A substantial performance is all that can be required. (*Hayward* v. *Leonard,* 7 Pick. 181; 19 Am. Dec. 269; *Britton* v. *Turner,* 6 H. N. 481; Phillips on Mechanics' Liens, sec. 134.) And where the building is substantially finished, although something unimportant, or not of the essence of the contract, may remain undone, the building is considered in law as finished, and instead of forfeiting all payments until the work has been completed, where there has been a compliance in important particulars, or where the facts will warrant the presumption that the work has been accepted by the owner, the courts will allow a recovery to the extent of the work completed. (Phillips on Mechanics' Liens, sec. 137.) And if default either in the workmanship or other agreements of the contract be made by the contractor, the owner may be indemnified to the extent of the loss sustained. The lien may be reduced by showing defectiveness in the work; and the owner will be held for the value of the work performed. (Phillips on Mechanics' Liens, sec. 137; Code Civ. Proc., sec. 1200.) The judgment is not void is to the owners of the real property in question. (Code Civ. Proc., secs. 1185, 1192; *West Coast Lumber Co.* v. *Newkirk,* 80 Cal. 275. *Phelps* v. *M. C. G. M. Co.,* 49 Cal. 336.)

HARRISON, J.—Action for the foreclosure of a mechanic's lien.

The plaintiffs contracted with the defendant Stufflebeem, who was the lessee of certain lands owned by the defendants Bashore, to do the work of painting, varnishing, and graining upon some buildings which Stufflebeem was constructing for himself upon said lands, upon the completion of which they were to receive $145.

The main issue presented in the case was, whether the plaintiffs had completed the work according to their contract.

The court found that the plaintiffs had substantially complied with all the terms of said contract, and completed said work on or about the tenth day of April, 1890, but that some small places in the houses were not properly grained and finished, and that the cost of properly finishing such places would be not more than five dollars, and thereupon gave judgment for the plaintiffs for the amount of the contract price after deducting said sum of five dollars.

1. It is contended by the appellants that the findings are contradictory, and do not support the judgment.

Neither of these propositions can be maintained.

The finding that the plaintiffs substantially complied with all the terms of their contract, and completed the work, is entirely consistent with the finding that some places in the houses were not *properly* grained and finished; and the finding that the cost of properly finishing such places would not be more than five dollars supports rather than contradicts the finding of substantial performance.

The performance of a contract need not in all cases be literal and exact, in order to entitle a party to compensation therefor. Especially is this the rule in contracts for labor by mechanics or artisans, where the quality of the work done, or the manner of its performance, is the sole matter in dispute, and is to be decided upon conflicting testimony. In contracts for the construction or repair of buildings, a substantial performance of his contract is sufficient to entitle the contractor to compensation for the work done by him under the contract. If there has been no willful departure from its provisions, and no omission of any of its essential parts, and the contractor has in good faith performed all of its substantive terms, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed. If the omission or imperfection is so slight that it cannot be regarded as an integral or sub-

stantive part of the original contract, and the other party can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action. (Wharton on Contracts, sec. 607; *Ligget* v. *Smith,* 3 Watts, 331; 27 Am. Dec. 358; *Phillip* v. *Gallant,* 62 N. Y. 264; *Hayward* v. *Leonard,* 7 Pick. 185; 19 Am. Dec. 269; *Sinclair* v. *Tallmadge,* 35 Barb. 604.) This rule is peculiarly applicable in a case where the other party has received the benefit of what has been done, and is enjoying the fruits of the work.

Section 1187 of the Code of Civil Procedure provides that: "Any trivial imperfection in the said work . . . . shall not be deemed such a lack of completion as to prevent the filing of any lien." If the lien can be "filed" notwithstanding such imperfection, it must follow that the claimant can foreclose his lien, and that the "trivial imperfection in the work" is no defence to the action. Whether the contract has been substantially performed is a question of fact which must be determined by the trial court in each instance from the facts and circumstances in that case, and the finding of the trial court upon that point is as conclusive as is its finding of any other fact.

The present case is before us upon the judgment roll alone. In the absence of the testimony upon this point, we are bound to assume that it was sufficient to support the finding that the plaintiffs substantially completed their contract, as also the finding that the defendants would be fully compensated for any imperfection in the work by deducting five dollars from the contract price. If they can be thus sompensated in damages, full justice is done to all parties by deducting that amount from the contract price, and allowing the contractor to recover for the work that has been done by him.

2. Appellants urge that it was error to order a sale of the interest of the defendants Bashore in the lands described in the judgment, and cite section 1185 of the

Code of Civil Procedure as declaring that only the interest of the person causing the building to be repaired is subject to the lien. But it is found by the court that the defendants Bashore knew, at the time, of the construction of the said buildings, and of all the terms and conditions of the contract between the defendant Stufflebeem and the plaintiffs at the time it was made, and also that on the completion of the work the defendant Rachel Bashore made a payment to the plaintiffs on account thereof. Section 1192 of the Code of Civil Procedure provides that when with such knowledge the owner fails to give notice that he will not be responsible for the same, his interest in the land shall be subject to the lien.

In *West Coast Lumber Co.* v. *Newkirk,* 80 Cal. 275, these sections were construed by this court on a similar state of facts, and it was held that the interest of the owner in the lands was subject to a lien for materials used in the construction of a building thereon, which was erected under a contract made by the owner of the leasehold estate. It was also held in that case that it was not necessary to aver that the owner of the realty did not give any notice that he would not be responsible for the construction of the building.

The judgment of the court below must be affirmed, and that court is directed, upon the filing therein of the *remittitur,* to allow plaintiffs, as a part of their costs on this appeal, a reasonable fee for the services of their attorney in this court. (Code Civ. Proc., sec. 1195.)

SHARPSTEIN, J., PATERSON, J., DE HAVEN, J., MCFARLAND, J., GAROUTTE, J., and BEATTY, C. J., concurred.

[No. 13612. Department One.—January 23, 1891.]

H. W. LATHAM, RESPONDENT, *v.* THE CITY OF LOS ANGELES, APPELLANT.

PUEBLO LANDS — GRANT — ACTION OF PUEBLO AUTHORITIES — PRESUMPTION.—The presumption attaches to a grant of lands by the ayuntamiento of a pueblo to a private person, who has been put in possession by the alcalde, that the authorities of the pueblo acted within the limits of their official authority in making the grant.

ID.—PUBLIC PLAZA—PUBLIC USE OF VACANT LAND—EVIDENCE.—The presumption attaching to the grant of pueblo lands is not overcome, nor is it sufficiently established that the land granted was a public plaza at the date of the grant, by mere evidence that before the grant the land was vacant, and was used by the owners of adjacent lots in going to and from their lots, and that upon certain days the public would use it as a place for public amusements.

ID.—DEDICATION—GIFT OR ABANDONMENT TO PUBLIC—INTENTION OF OWNER—EVIDENCE—NON-ASSERTION OF RIGHT.—To show a dedication of land by the owner as a public plaza, without any conveyance, and merely by way of gift or abandonment, the intent of the owner to make the dedication should be clearly proven by evidence of his express declarations, admissions, or affirmative acts, or of circumstances establishing his purpose or intention to donate the use to the public; and the mere non-assertion of a right, without such evidence, does not establish a dedication.

ID.—PETITION FOR EXCHANGE OF LANDS—ADMISSION OF DEDICATION.—A petition by the owner of land granted by the authorities of a pueblo, praying for "an exchange or indemnification for certain lands belonging to her, and now occupied by the public, being the lot at the entrance of Negro Alley into the public square," is not an admission of a dedication to the public of the land sought to be exchanged; and the action of the city council directing a concession to be made to her of other land is not consistent with a claim that the land proposed to be exchanged then belonged to the city.

ID.—CONCESSION OF EXCHANGE—FAILURE OF CONSUMMATION—NON-DELIVERY OF DEED—RECONVEYANCE BY CITY.—The action of the city council directing a concession to be made to the owner of other land, in accordance with which a deed was drawn up and signed by the mayor conveying a certain lot, is not sufficient evidence of the consummation of the exchange contemplated, there being no proof of the delivery of the deed, and it appearing that the lot so deeded was subsequently conveyed by the city to a third person.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The action was brought by the plaintiff against the city of Los Angeles and one L. M. Bigelow, to quiet title to certain land in the city of Los Angeles. By a stipulaion filed in the lower court, the only portion of the property described in the complaint of which the title was litigated was a lot known as the "engine-house lot," to which the plaintiff claimed title under a grant from the former pueblo. The acts and documents of the pueblo authorities upon which the plaintiff based his title to this lot consisted of a petition of Juan B. Leandry dated March 4, 1836, addressed to the ayuntamiento, as follows:—

"*Most Illustrious Ayuntamiento,*—Juan Bautista Leandry, according to law, before your honors, respectfully represents that, desiring to have the necessary security to prove the ownership that is his in the house wherein he dwells and the lot whereon it is built, I petition your honors to grant me the title of possession of the land I occupy, and also that which is vacant in front of the houses, that of Don Francisco Sepulveda and that which Don Abel Stearns now occupies, to the street in front of the same.

"On common paper for lack of sealed."

"Angeles, March 4, 1836.

"JUAN B. LEANDRY."

An order of the ayuntamiento of March 10, 1836, referring the petition to the committee on police, as follows:—

"Angs., March 10, 1836.

"The foregoing petition presented to the very honorable ayuntamiento, in session of to day, it ordered that it pass to the committee on police.

"MANUEL REQUENA, Pres. [Rubric.]

"NARCISCO BOTELLO, Sec'y. [Rubric.]"

The report of the committee on police of April 27th, as follows:—

"Angs., Aprli 27, 1836.

"*Very Illustrious Ayuntamiento.*—The committee on police have examined the land which the Senor Juan

Bta. Leandre asks for, and they found no reason which it might not be conceded him. Also the title of ownership which this petition cites.

"ABEL STEARNS.
"JOSE MA HERRERA. [Rubric.].
"BACILIO VALDEZ. [Rubric.]"

The minute entry of the procedings of the ayuntamiento of April 28, 1836, as follows:—

"Angs., April 28, 1836.

"The foregoing report presented in session of this to the honorable ayuntamiento of this city, it was approved. Wherefore the town attorney will proceed to place the interested party in possession, respecting the order and harmony of the streets. The party interested subject to the disposition of the superior authorities upon this matter.

"MANUEL REQUENA, Pres. [Rubric.]
"NARCISCO BOTELLO, Sec'y. [Rubric.]"

And the entry in the city archives dated December 17, 1836, as follows:—

"In the city of Los Angeles, on the seventeenth day of December, 1836, I, Manuel Requena, first constitutional alcalde of this city, according to that ordered by the allustrious ayuntamiento, I went, together with my assisting witnesses, to give the possession that this expediente prescribes in favor of Don Juan Bautista Leandry, and the house belonging to him in which he dwells, measuring 24 varas north to south, and 36½ east to west, and also the vacant land which is in front of said house, measuring 37 varas to the north, and 23½ east and west, of which land the said Don Juan Bautista Leandry remains in possession; and that it so appear and serve him as title of possession, I make the present proof, signing it with the assisting witnesses with whom I act for lack of a clerk, on this paper for lack of a proper kind. [Signed] MANUEL REQUENA."

The further facts are stated in the opinion of the court.

Bearden & Daly, and *C. McFarland,* for Appellant.

Johnston & Borden, and *Chapman & Hendrick,* for Respondent.

DE HAVEN, J.—This is an action by the plaintiff, Latham, against the defendants, the City of Los Angeles and one L. M. Bigelow, to quiet title to certain tracts of land in the city of Los Angeles, but by stipulation between the plaintiff and the said city—filed in the court below—the only portion of the property described in the complaint now in litigation is the lot known as the engine-house lot.

There was also a stipulation entered into between the plaintiff and the defendant Bigelow, by which it was agreed, in addition to other matters, that the plaintiff and said Bigelow were "equally interested, and held in equal and undivided parts the lot known as the engine-house lot."

The judgment of the court below was to the effect that the plaintiff and said defendant Bigelow are the owners in equal shares of said engine-house lot, and that the city of Los Angeles has no right in or title to the same.

The defendant city moved for a new trial, which was denied, and from the judgment, and the order denying its motion for a new trial, appeals. The appeal is from the whole judgment, and the defendant Bigelow has not been served with notice of appeal.

The findings support the judgment.

The plaintiff deraigns title through a grant or order made by the ayuntamiento of the pueblo of Los Angeles to one Leandry, and the possession given him by the alcalde in pursuance of such order.

That the pueblo had authority to make the grant of the land in question to said Lenadry, if it was a house lot, is not questioned, but it is claimed—as we under-

stand the contention of appellant—that the grant is void for uncertainty, and for the further reason that, prior to the alleged grant, which was in 1836, the land in question had become a public plaza, or street, and for that reason could not be granted for private purposes.

We think, however, that the petition and the orders made by the authorities of the pueblo thereon, and the report of the alcalde describing the land, of which he had given Leandry possession by order of the ayuntamiento, when read together, as they must be, are sufficiently definite, and that the calls therein embrace the land in controversy was shown upon the trial by uncontradicted extrinsic evidence. Nor is the evidence sufficient to show that at the date of this grant the lot in controversy was a public plaza, and therefore beyond the authority of the pueblo to grant. It does appear that it was vacant, and that it was used by owners of adjacent lots in going to and from such lots; but it is not shown that such lots were granted, with reference to this lot, as a plaza, or that it ever had been in any manner set apart or recognized by the authorities as a plaza. It is also shown that upon certain days the public would use it as a place for celebrating and for other public amusements. But all of this only shows that, being vacant and unoccupied, it was used as any other vacant land might have been, and is not sufficient to overthrow the presumption that the authorities of the pueblo of Los Angeles acted within the limits of official authority in making to Leandry the grant or concession in question. That such presumption attaches to the grant we are considering is the effect of the decisions of this court in *Cohas* v. *Raisin,* 3 Cal. 453; *Payne* v. *Treadwell,* 16 Cal. 220.

We cannot say that the evidence in this case is such that the trial court must necessarily have found that since said grant Leandry, or any of those who have succeeded to his title, dedicated the lot in question to the

public as a plaza; and such being the state of the proof, we do not feel authorized to set aside its finding upon this point. When it is sought to show that an owner has, without a conveyance, divested himself of title to land in favor of the public, by way of gift or abandonment, the proof ought to be such as to clearly show that such was the owner's intent.

In *Grube* v. *Nicols,* 36 Ill. 92, it is said: "The intention to dedicate is a vital, controlling element in such a grant. A dedication is not an act of omission to assert a right, but it is the affirmative act of the mind of the donor. It arises from the active and not the passive condition of the mind of the owner. The mere non-assertion of a right does not establish a dedication, unless the circumstances establish the purpose or intention to donate the use to the public."

There is no evidence in the record of any express declaration or admission by Leandry, or any successor in interest, showing that such dedication was made.

The petition of Mrs. O'Campo praying for "an exchange or indemnification for certain lands belonging to her, and now occupied by the public, being the lot at the entrance of Negro Alley into the public square," supposing it to refer to the land in controversy, is not an admission that the same had been dedicated to the public. It is rather an assertion of her right to it and willingness to either accept pay for it, or an exchange of other lands; and the action of the city council directing a concession to be made to her of other land, in accordance with her petition, is not consistent with the claim now made, that the lot in controversy was then the property of the city.

It would appear, from the evidence, that, in accordance with this resolution of the city council, a deed was drawn up and signed by the mayor, conveying to Mrs. O'Campo a certain lot in the city of Los Angeles. But whether this was actually delivered to her does not so

clearly appear. It was, however, delivered to one Olvera, supposed by the mayor to be her agent. But the deed itself was not produced, nor any witness who had evre seen it in the possession of Mrs. O'Campo, and it was admitted that subsequent thereto the city had conveyed the same lot to another. We cannot say from this evidence that the exchange contemplated by the petition of Mrs. O'Campo and the city council was ever consummated. And in this connection it may be added that the testimony shows that the first public act by which the city attempted to assert dominion over the lot in controversy was by building the engine-house, which was in 1884.

The conclusion which we have thus reached upon the merits makes it unnecessary to determine whether the failure to make the defendant Bigelow a party to this appeal entitles the respondent to a judgment dismissing the appeal, and upon this point we express no opinion.

Judgment and order affirmed.

HARRISON, J., and PATERSON, J., concurred.

[No. 14013. Department Two.—January 26, 1891.]

J. N. MUNDELL, APPELLANT, *v.* THE CITY OF PASADENA, RESPONDENT.

MUNICIPAL CORPORATIONS—COMPENSATION OF CITY MARSHAL.—The compensation of a city marshal of a municipal corporation of the sixth class, as fixed by the board of trustees under section 855 of the municipal corporation act, is for all duties imposed on the marshal by the act.

ID.—FEES FOR SERVICES IN RECORDER'S COURT.—The city marshal cannot recover from the city any fees for services rendered in arresting offenders, and summoning witnesses and jurors, by virtue of warrants of arrests, subpœnas, and *venires* issued out of the recorder's court of the city.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

Gage & Roberts, for Appellant.

W. A. Arthur, for Respondent.

The COURT.—This is an action to recover for services rendered by the plaintiff as city marshal of the defendant. A general demurrer to the complaint was interposed and sustained. The plaintiff declined to amend, and thereupon the court gave judgment that he take nothing. From that judgment he appeals.

The facts stated in the complaint are, in substance, as follows: In April, 1886, and again, in 1888, the plaintiff was duly elected city marshal of the city of Pasadena, a municipal corporation of the sixth class. Each term of office was two years, and after each election he duly qualified and entered upon the discharge of his official duties. His compensation of both terms was fixed by the board of trustees of the city at eight hundred dollars per year, and was paid. Between the thirty-first day of July, 1886, and the thirtieth day of April, 1888, he rendered services to the defendant corporation, in arresting offenders, and summoning witnesses and jurors, by virtue of warrants of arrest, subpœnas, and *venires* duly and regularly issued out of the recorder's court of the city, and for these services the defendant became and is indebted to him in the sum of $863.55. Again, between the first day of May, 1888, and the twenty-second day of March, 1889, he rendered other like services, for which the defendant became and is indebted to him in the sum of $318.25. Before commencing his action, he demanded of defendant payment of both sums, but the defendant refused and still refuses to pay the same, or any part thereof.

The act of the legislature entitled "An act to provide for the organization, incorporation, and government of municipal corporations," approved March 13, 1883,

(Stats. 1883, p. 93) provides, in the chapter relating to "Municipal corporations of the sixth class" (sec. 855), that the clerk, treasurer, marshal, and recorder shall severally receive at stated times, a compensation to be fixed by ordinance by the board of trustees, which compensation shall not be increased or diminished after their election, or during their several terms of office." And section 880 of the same chapter provides what duties the marshal shall be required to perform. Among other things, it says: "He shall and is hereby authorized to execute and return all process issued and directed to him by any legal authority. . . . . He shall, for service of any process, receive the same fees as constables. He may appoint, subject to the approval of the board of trustees, one or more deputies, for whose acts he and his bondsmen shall be responsible, whose only compensation shall be fees for the service of process, which shall be the same as those allowed to the marshal."

In *Pritchett* v. *Stanislaus County,* 73 Cal. 310, the plaintiff was marshal of the city of Modesto, a city of the sixth class, in the county of Stanislaus. He brought his action against the county to recover for services rendered by him in the execution of process, such as warrants of arrest and subpœnas, issued out of a justice's court of the county in criminal cases. A demurrer to the complaint was interposed and sustained. It was said by this court, referring to the provisions of the statute above quoted: "The compensation fixed by the board of trustees under section 855 is to be for all duties imposed on the marshal by the act. These duties are set forth in section 880 (Stats. 1883, p. 277), and include the duty to execute and return all process issued and directed to him by any legal authority; and, by the same section, for the service of any process he is to receive the same fees as constables." And again: "It does not appear that the board of trustees of the city of Modesto has passed any ordinance fixing the compensation of the marshal, but we

presume it has. If it has passed such ordinance, the marshal is only entitled to the compensation so fixed. If no such ordinance has been passed by it, then the marshal can recover nothing." It was held that the demurrer was properly sustained, and the judgment was affirmed.

That case is directly in point here, and upon its authority it must be held that the demurrer in this case was properly sustained, and the judgment must be affirmed. So ordered.

[No. 13688. Department One.—January 28, 1891.]

WILLIAM UNDERWOOD, APPELLANT, *v.* CATHERINE UNDERWOOD, RESPONDENT.

SETTING ASIDE JUDGMENT—INADVERTENCE AND MISTAKE—DISCRETION.—The action of the trial court in setting aside a judgment upon a showing of inadvertence and mistake will not be disturbed, if the appellate court cannot say, under all the circumstances, that the court below abused its discretion, even though the showing may be a weak one.

ID.—JUDGMENT QUIETING TITLE—DISCLAIMER—INADVERTENCE AND MISTAKE OF ATTORNEY—LIS PENDENS—DEFENSE BY GRANTEES OF DEFENDANT.—An order setting aside a judgment quieting the title of the plaintiff to city lots to which the defendant disclaimed title, and allowing the grantees of the defendant to come in and defend, will not be disturbed, if it is shown on the part of the defendant and his grantees that the disclaimer was made through an inadvertence and mistake of fact of the defendant's attorney in supposing that the property had been conveyed by the defendant before the commencement of the suit, whereas in fact the conveyances were made pending the suit, and after a notice of *lis pendens* had been filed by the plaintiff.

APPEAL from an order of the Superior Court of Los Angeles County setting aside a judgment.

The facts are stated in the opinion of the court.

Henry M. Smith, and *Horace Bell,* for Appellant.

C. C. Stephens, for Respondent.

PATERSON, J.—This is an action to quiet title to several parcels of land situate in the city of Los Angeles. A notice of *lis pendens* was filed by plaintiff at the time the action was commenced. The defendant filed her verified answer, denying that plaintiff had any right, title, or interest in any of the lots described in the complaint. After this answer was filed, the defendant sold and conveyed to the respondents, John S. Underwood, Mary E. Regan, and Samuel A. Moore, all of the lots described in the complaint, except "lot 13, in black A." Thereafter, the attorney of defendant having died, she employed another attorney, who, after being informed by her of all the facts, filed an amended and unverified answer, disclaiming on the part of the defendant any interest in any of the property described in the complaint, except said lot 13.

The court found that defendant was the owner of said lot 13, in block A, and that plaintiff was the owner of the other lots in controversy, and judgment was entered accordingly on April 18, 1889. On July 22, 1889, the defendant moved the court to set aside the judgment, and for permission to amend her amended answer by striking out said disclaimer, on the ground that the amended answer containing the disclaimer had been filed through inadvertence and mistake. In support of her application, she filed an affidavit, setting forth that upon the advice of her first attorney she had sold the property (described in the disclaimer) to said Underwood, Regan, and Moore, in good faith, and for a valuable consideration; that upon the death of her attorney she had employed another counsel, and the latter, *after* being informed of all the facts, filed an amended answer containing the disclaimer, "he believing and understanding that said conveyances were made prior to the commencement of this action;" that "said disclaimer was an inadvertence and a mistake of fact; that judgment was entered against her by reason of said mistake,

and that she had no notice of the state of pleadings until July 10, 1889, when a writ of assistance was served on one of her grantees." Affidavits were filed by John S. Underwood and Mary E. Regan, alleging that the facts set forth in defendant's affidavit were true, and asking that they might be allowed to come in and defend against the claim of plaintiff. The attorney who filed the amended answer made an affidavit showing that when he drew it he understood that the property described in the disclaimer had been conveyed by defendant before the suit was commenced.

A counter-affidavit was filed by Horace Bell, showing that he had taken a portion of the property described in the disclaimer from the plaintiff for a valuable consideration subsequent to the judgment, without notice of any transfer by defendant, and after a search of the record, which failed to disclose any conveyance from defendant, and after the attorney for defendant had informed him that he knew of nothing that would invalidate the conveyance.

The court granted the motion to set aside the judgment, and from its order the plaintiff has appealed.

The showing made on motion to set aside the judgment is a very weak one, but we are always unwilling to interfere with the decision of the court below in matters of this kind.

The attorney for the defendant doubtless acted in good faith, and, as he supposed, for the best interest of his client, but under a mistake of fact as to the time when defendant had parted with her interest in the lots. We cannot say, under all the circumstances, that the court below abused its discretion.

The order appealed from is therefore affirmed.

GAROUTTE, J., and HARRISON, J., concurred.

[No. 13998. Department Two.—January 30, 1891.]

LEWIS B. HARRIS, APPELLANT, *v.* SAN DIEGO FLUME COMPANY, RESPONDENT.

PRINCIPAL AND AGENT—OSTENSIBLE AUTHORITY.—To make a case of ostensible authority, the act giving color of authority to the supposed agent must be known to the person who dealt with him, and must induce a belief in the mind of such person that the authority exists. If he does not know of any facts giving color of authority to the supposed agent, but relies wholly upon the statements of the latter as to the existence of his authority, he cannot recover, although facts existed which, had he known them, might have justified belief in the existence of the authority.

ID.—BURDEN OF PROOF.—The party maintaining that an ostensible authority existed must prove that he knew of the facts giving color of authority to the supposed agent. A mere surmise that he knew them is not sufficient.

PRINCIPAL AND AGENT—IMPLIED AUTHORITY—BURDEN OF PROOF.—While an agent has implied authority to do everything necessary, or proper and usual, in the ordinary course of business, for effecting the purpose of his agency, the party maintaining the existence of the agency must make it appear that the thing done was necessary, or proper and usual, etc.

ID.—JUDICIAL NOTICE.—The court cannot know judicially that the employment of a high-priced broker is necessary, or proper and usual, in the ordinary course of business, to get a contractor to enter into a contract for building a flume.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order refusing a new trial.

The facts are stated in the opinion.

Deakin & Story, and *Thomas J. Capps,* for Appellant.

The agent of the defendant had authority to employ the plaintiff. (Civ. Code, secs. 2319, 2320; 2 Morawetz on Corporations, secs. 585, 586; *San Francisco Gas Co.* v. *San Francisco,* 9 Cal. 470; *Pixley* v. *Western Pacific R. R. Co.,* 33 Cal. 188; 91 Am. Dec. 623.) The actual authority of an officer of a corporation does not depend so much on his title, or the theoretical nature of his office, as on his apparent authority, and the duties he is in the habit of performing. (Taylor on Corporations, sec. 202; 2 Morawetz on Corporations, secs. 509, 578, 579, 616.)

Shaw & Howland, for Respondent.

HAYNE, C.—This was an action to recover five thousand dollars as brokerage for negotiating a contract. The complaint contained two counts, but the plaintiff elected to go to trial upon a *quantum meruit.* The trial court gave judgment for the defendant, and the plaintiff appeals.

The principal question discussed by counsel relates to the authority of the person who employed the plaintiff.

The defendant was a corporation "to construct and operate a flume for the transmitting of water." At the period in question its flume had not been constructed.

The engineering work was being done, and the business of acquiring rights of way, etc., was being attended to. In the beginning of August, 1886, the company sent its superintendent, one W. E. Robinson, to San Francisco to negotiate a contract for the construction of the flume. He employed the plaintiff as broker to find a contractor, and through the plaintiff's exertions a suitable person was found. The claim is for compensation for services as such broker.

1. The defendant cannot be held on the ground of ostensible or apparent authority. There is evidence to the effect that in the county of San Diego Robinson was permitted by the company to do things outside of his ordinary duties as superintendent. And the plaintiff's son, who was an engineer in the employment of the company, testified that on the eve of Robinson's departure for San Francisco the president told him that Robinson "had full authority" to enter into contracts. This latter evidence is contradicted. The former is not. But neither is ground for a decision in favor of plaintiff on the theory of an ostensible or apparent authority; for it does not appear either that the alleged statement of the president was communicated to the plaintiff, or that he was aware of the latitude which had been permitted Robinson in San Diego. It may possibly be surmised that he had

knowledge of the circumstances; but the fact is not stated, and a mere surmise is not sufficient. "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code, sec. 2317.)

There are two essential features of an authority of this character; viz., the party must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held. A belief founded on the agent's statements is not sufficient; for a party has no right to take the agent's word for the existence of his authority. In the case before us, as above stated, it does not appear that the acts of the company which are supposed to have been sufficient to justify a belief in Robinson's authority were known to the plaintiff; and if not, they could not have generated in his mind any belief on the subject of the agency.

There may be other reasons why the plaintiff cannot recover on this ground, but the one given is sufficient.

2. There was no actual authority, either express of implied. The measure of the agent's authority was the following resolution of the board of directors of the company:—

"*Resolved,* That W. E. Robinson be authorized to proceed to San Francisco and enter into negotiations with conrtactors and others for work on the line of the flume, in his discretion, subject to the approval of this board; also, that he be authorized to enter into negotiations with capitalists for the purchase of not exceeding five hundred thousand dollars in the bonds of the company."

Nothing appears to have been done by the plaintiff in relation to the disposition of the bonds. His claim is for finding a contractor who was willing to enter into a contract for the building of the flume. In the language of appellant's counsel, "for the peculiarly difficult and rare services rendered by him in introducing and assisting in procuring Mr. Moore to take this contract, the

plaintiff claims the moderate commission of five thousand dollars."

In relation to this, we concede, in favor of the appellant, that the words "subject to the approval of this board," contained in the resolution, refer only to the contract for the construction of the flume, which was to be negotiated by Robinson, and that he had implied authority "to do everything necessary, or proper and usual, in the ordinary course of business, for effecting the purpose of his agency." (Civ. Code, sec. 2319.) But we are not able to say that the employment of a high-priced broker is "necessary, or proper and usual, in the ordinary course of business," for finding a contractor to build a flume. At least we do not think that the court can take judicial notice that such is the case; and we do not find any satisfactory evidence of it in the record. There is evidence that it was a matter of some difficulty to induce contractors to go to so distant a field of action, and some evidence that the plaintiff's services had a value. But the latter evidence seems to be on the general theory that whatever a broker does has a value. Upon the whole evidence, we cannot say that the finding of the trial court should be disturbed.

3. The defendant cannot be made liable upon the theory that it appropriated the benefit of the plaintiff's services. The unauthorized arrangement made by Robinson with the plaintiff was collateral to the flume contract, and the defendant knew nothing of such services at the time the flume contract was entered into.

The other matters do not require special attention.

We therefore advise that the judgment and order appealed from be affirmed.

BELCHER, C., and VANCLIEF, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

[No. 13926. Department Two.—January 30, 1891.]

O. T. JUSTICE, RESPONDENT, *v.* GEORGE T. OTT, GUARDIAN, ETC., APPELLANT.

ACTION ON NOTE—PARTIES—INCOMPETENT PERSON—GUARDIAN.—An action upon a promissory note made by an incompetent person cannot be maintained against his guardian, but should be brought against the incompetent person.

ID.—SERVICE OF SUMMONS—APPEARANCE OF GUARDIAN.—The summons in an action against an incompetent person must be served upon both the incompetent and his guardian; and it is then the duty of the guardian to appear and defend the action.

ID.—GUARDIAN AD LITEM.—If deemed expedient, the court may also appoint a guardian *ad litem* to represent the incompetent.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

Wells, Guthrie & Lee, for Appellant.

W. T. Williams, for Respondent.

BELCHER, C.—This is an action upon a promissory note. A personal judgment for the amount due on the note was entered against the defendant, Ott, by default, and from that judgment he appeals.

It is alleged in the complaint that Jesse Justice made and delivered to the plaintiff his promissory note for one thousand dollars, dated November 18, 1879, and payable five years after date, with interest; that plaintiff is still the owner and holder of the note, and that no part of the principal or interest thereof has been paid; "that on the —— day of May, 1888, by an order of the superior court duly made and entered, said defendant, George T. Ott, was appointed the guardian of the estate and person of said Jesse Justice, and that he is now such guardian; that on or about the eighteenth day of May, 1888, plaintiff demanded of said guardian the payment

of said promissory note, and the interest thereon, but said guardian refused to pay said note, or any part thereof"; wherefore the plaintiff prayed for judgment against the defendant, George T. Ott, as such guardian, for the principal and interest due on the note, amounting to two thousand four hundred dollars.

A summons was issued, addressed to "George T. Ott, guardian, etc., and he was thereby notified that if he failed to appear and answer the complaint, the plaintiff would cause his default to be entered, and would take judgment against him for two thousand four hundred dollars, and costs of suit. The summons was served on the defendant personally, by delivering to him a copy thereof, and a copy of the complaint, but, so far as appears, no service was made on or notice given to Jesse Justice. The affidavit shows service on the defendant, and states the time but not the place of service.

On the twenty-third day after the defendant was served, the clerk of the court, by direction of the plaintiff's attorney, entered his default, and on the next day entered against him a personal judgment for the amount prayed for in the complaint.

It is very clear that this judgment cannot be sustained. The facts stated in the complaint do not show any personal obligation on the part of the defendant to pay the note. The obligation, if any, was on the maker, and the action should have been brought against him, though an incompetent, and not against his guardian. (*Brown* v. *Chase,* 4 Mass. 436; *Raymond* v. *Sawyer,* 37 Me. 406; *Robinson* v. *Hersey,* 60 Me. 225; *Coombs* v. *Janvier,* 31 N. J. L. 240; *Van Horn* v. *Hann,* 39 N. J. L. 207; *Steel* v. *Young,* 4 Watts, 459; *Fox* v. *Minor,* 32 Cal. 118; 91 Am. Dec. 556.)

If the action had been properly brought, the summons would have been served on both the incompetent and his guardian (Code Civ. Proc., sec. 411, Subd. 4), and it would then have been the duty of the guardian to appear

and defend the action. (*Gronfier* v. *Puymirol,* 19 Cal. 632.) And if deemed expedient, the court might also have appointed a guardian *ad litem* to represnt the incompetent. (Code Civ. Proc., sec. 372.)

Other grounds for reversal are argued by counsel, but they need not be considered.

For the reasons above stated, we advise that the judgment be reversed, and the action dismissed.

HAYNE, C., and VANCLIEF, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is reversed, and the action dismissed.

Hearing in Bank denied.

[No. 13762. Department Two.—January 30, 1891.]

H. L. WILLIAMS, RESPONDENT, *v.* J. G. MITCHELL ET AL., APPELLANTS.

VENDOR AND PURCHASER—FRAUDULENT REPRESENTATIONS OF VENDOR'S AGENT—KNOWLEDGE OF VENDEE—CONFLICTING EVIDENCE—REVIEW ON APPEAL.—Where alleged fraudulent representations in the sale of land are claimed to have been made by the agent of the vendor, and the evidence shows that the vendee had means of knowledge as to the facts, and is conflicting as to whether the representations were made, a finding that there was no fraud on the part of the vendor will not be disturbed on appeal.

ID.—MORTGAGE FOR PURCHASE-MONEY—FAILURE OF CONSIDERATION—INVALIDITY OF WATER CERTIFICATES.—The fact that "water certificates" of a water company, forming part of the property sold, are invalid, does not constitute a partial failure of the consideration of a note and mortgage given for the purchase-money, if the water company has not failed or refused to furnish the water in conformity with the certificates, and is ready and willing to perform its obligation.

ID.—RECISSION BY PURCHASER—UNREASONABLE DELAY.—The recission by the purchaser of an executed contract for the sale of land and water certificates on the ground that the water certificates are void, and that the consideration has failed, must be made with reasonable promptness; and a delay of seventeen months after the purchase, and until two months after the commencement of a suit to foreclose a mortgage given for the purchase-money, before offering to rescind, is unreasonable.

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order denying a new trial.

The facts are stated in the opinion.

Waters & Gird, Allen & Miller, and *Harris & Gregg,* for appellants.

The water certificates are void, because issued gratuitously, and constituting a fictitious increase of indebtedness of the water company (Const., art. 12, sec. 11), and because representing a withdrawal of part of its capital stock. (Civ. Code, sec. 309; *Martin* v. *Zellerbach,* 38 Cal. 300; 99 Am. Dec. 365; Morawetz on Corporations, secs. 443–457.)

G. E. Harpham, and *H. M. Willis,* for Respondent.

The validity of the water certificates is not involved in the issues. Defendants' right to rescind, if it ever existed, has been lost by laches. (Civ. Code, sec. 1691; *Gifford* v. *Carvill,* 29 Cal 593; *Blen* v. *Bear River etc. Co.,* 20 Cal. 615; 81 Am. Dec. 132.)

VANCLIEF, C.—On June 11, 1887, the plaintiff sold and conveyed to the defendants six lots of land containing twenty acres each, and at the same time assigned to the defendants certain written obligations of the Bear Valley Land and Water Company (a corporation), to furnish and deliver at a certain point a certain quantity of water to be used on each of said lots, called "water certificates." The consideration to be paid by the defendants for the land and water certificates was twenty-four thousand dollars, of which six thousand dollars was paid in hand. For the balance of the purchase-money the defendants made two promissory notes to the plaintiff, of nine thousand dollars each, secured by their mortgage on said land. This action is brought to foreclose the mortgage.

The answer of the defendants admits the execution of the notes and mortgage, and then proceeds as follows:—

"2. That said notes and mortgage were executed and delivered as and for part of the purchase-money of said real estate in complaint described, together with certain water rights by plaintiff represented as appurtenant thereto, as well as for certain shares of stock in the Bear Valley Land and Water Company, a corporation organized and existing under the laws of the state of California, and for no other or further consideration.

"3. That said defendants were induced to so purchase said lands and stock, and to execute and deliver said notes and mortgage, by means of false and fraudulent representations at the time and before that time made by plaintiff to defendants, in this, to wit: That at and before the purchase of said real estate, appurtenances, and shares of stock, the said plaintiff, by and through his duly authorized agent, represented to defendants that water for irrigation purposes was actually piped on said land from the reservoirs of said Bear Valley Land and Water Company; that the right to use twelve miners' inches of said water was appurtenant to said land; that plaintiff would transfer and deliver to defendants shares of stock in said Bear Valley Land and Water Company representing ownership of twelve miners' inches of water of said corporation; that plaintiff owned the land lying immediately adjacent to the premises in complaint described; that upon said lands plaintiff would at once cause to be constructed a large hotel building at a cost of twenty thousand dollars, and numerous private dwellings; that the materials to be used in their construction were already purchased by plaintiff, and the contract for the erection thereof let.

"4. Defendants, relying upon such representations, and believing them to be true, and on the faith thereof, purchased said premises in complaint described, and said stock of plaintiff, and on the 11th of June, 1887,

accepted from plaintiff a deed therefor, with six certain instruments in writing, issued under the seal of said Bear Valley Land and Water Company and signed by its president and secretary, denominated water certificates, and in consideration thereof paid to plaintiff six thousand dollars in cash, and executed the notes and mortgage as in complaint set out and described.

"5. That at the date of the acceptance of said deed and said water certificates, defendants believed that said water certificates were in fact shares of stock in said corportion, and entitled the defendants, as holders thereof, to the rights and privileges of stockholders in said corporation, and conveyed to defendants the rights and privileges so contracted to be conveyed and transferred by plaintiff to twelve miners' inches of water of said corporation.

"6. Defendants allege that notwithstanding said promises and representations of plaintiff, that neither at the time of said purchase, or now, or at any time, or at all, was any water piped on said land from the reservoir of said Bear Valley Land and Water Company, nor from any water supply or source, and no pipes for conveying water were laid on said land at all, nor in the vicinity thereof.

"7. That in truth and in fact no water rights were appurtenant to said lands, and no hotel building or private dwellings, or structures of any kind, have been erected on said adjacent lands, in whole or in part, except a certain excavation alleged to be for a basement for a hotel, although more than one year has elapsed since said purchase, and no steps have been taken by plaintiff to cause said improvements, or any of them, to be made on said adjacent lands, although he has ever since remained and still remains the owner and holder thereof.

"8. That said lands were at the date of said purchase, and now are, irrigable lands, and without water rights

appurtenant, or water for use in irrigation, are of little value, and worth less than five thousand dollars; that water rights appurtenant to such lands, for purposes of irrigation, would be valuable, and worth six thousand dollars, and more; that shares of stock in said Bear Valley Land and Water Company representing twelve miners' inches of water would be of great value, to wit, of the value of five thousand dollars, and more; that the erection and construction of said hotel buildings and private dwellings as agreed upon would enhance the value of said premises ten thousand dollars, and more; that without said improvements on said lands adjacent, the premises so purchased by defendants are worth ten thousand dollars less than with such improvements made as represented.

"9. Defendants are informed and believe, and therefore allege the fact to be, that said written instruments styled water certificates issued by said corporation to defendants were and are issued without authority of law, and are void; that said corporation had no authority in law to issue the same, and the issuance of the same conveyed and transferred no rights as stockholders or otherwise to defendants; that the same are not shares of stock, and do not transfer or vest in the defendants the privileges or rights of stockholders, and do not convey or vest in defendants twelve miners' inches of water of said corporation, or any water or rights whatsoever, and the same are of no value; and defendants allege that they were ignorant of the true character and value of said written instrument styled water certificates, until the commencement of this action; and defendants further allege that plaintiff never transferred, conveyed, or attempted to convey, to said defendants any of said water rights or shares of stock in said Bear Valley Land and Water Company whatever.

"10. Defendants allege that the acts, omissions, and representations of plaintiff above set forth were done

and made by him with intent to defraud, and that he thereby did defraud, defendants of their rights in the premises.

"11. Defendants allege further, that by reason of the acts, omissions and representations, practices and fraud, of plaintiff, as above set forth, the consideration for said notes in complaint mentioned has wholly failed, and the same were obtained by fraud, and wholly without consideration, and plaintiff should not maintain his action thereon."

The defendants also filed what they denominate "a further answer to complaint, and by way of cross-complaint," in which they allege, substantially, the same facts alleged in their answer, with only the additional averment that on December 13, 1888 (nearly two months after the commencement of this action), the defendants tendered to plaintiff a reconveyance of the land and reassignment of the water certificates, and demanded a surrender and cancellation of the notes, and a return of the cash payment of six thousand dollars, all of which was rejected and refused by the plaintiff. The prayer of the cross-complaint is, that the notes be canceled, and that defendants have judgment against the plaintiff for the six thousand dollars paid, and interest.

The water certificates and the indorsements thereon are in the following form:—

"(Class A. 7,200 certificates. Issue of June 1, 1886. No. 118. Number of certificates, 20.)

"Bear Valley Land and Water Company water certificate.

"These twenty certificates, issued by the Bear Valley Land and Water Company, a corporation, to Rhodes, Mitchell & Hoopes, for twenty acres, are guaranteed by said company to entitle the holder hereof to receive a continuous flow of one seventh of an inch of water to each acre of land to which the same shall be devoted, or multiple thereof, as is designated on the face hereof, for the six summer months in each year, for the contract

times beginning under the contracts of this company with the North and South Fork ditches, respectively. The inch mentioned herein is equivalent to a flow of one fiftieth of a cubic foot per second. The holder of this certificate may elect to accumulate the use of water hereunder in any one or more months of said six months, the aggregate in any one month not to exceed one fourth of the whole for that year, and the holder is also entitled to his proportion of the six months' winter water accruing under the contracts of the North or South Fork ditches, on which it may be used in the proportion which this issue of certificates and those that may be hereafter issued bears to the whole of such benefits. The point of delivery of water used under this certificate shall be at the points designated in the contracts with the North and South Fork ditches, respectively. This issue or award of water is adopted as a method of distribution and of the use of the same to the company's stockholders in consideration of the covenants contained in the indorsement hereon; and the interest represented by this certificate shall not become appurtenant to or pass by voluntary act or by operation of law with any land upon which the water represented may be used. A transfer hereof shall only be made by surrender of this certificate to the company and the reissuance of a new certificate, and upon the signature of the concurrent contract on the records of the company.

"J. G. BURT, President.

[Seal of said company.] "E. A. HOLT, Secretary."

Indorsement: "The holder of this certificate hereby accepts the same on the following conditions: That this certificate shall and is to be held subject to and in accordance with the terms of the contract signed by the holder hereof upon its issuance by the company."

The contract mentioned in the indorsement on the certificate to be signed by the holder was signed by the defendants on July 7, 1887, and is as follows:—

"Know all men by these presents, that whereas, the Bear Valley Land and Water Company, a corporation, has this day issued to the undersigned, Rhodes, Mitchell & Hoopes, twenty certificates of said corporation, being certificate No. 113, in consideration of the agreements hereinafter contained, and subject to the conditions hereinafter set forth and contained in said certificate, and the undersigned has received and accepted said water certificates subject to all such agreements and conditions,—

"Now, therefore, we hereby agree that in consideration of the issuance of said water certificates to us by said corporation, and in payment for the water which said certificates entitle us to receive each year from said corporation in accordance with the provisions of said certificate,—

"We will, without notice or demand, pay to said corporation annually hereafter, and within thirty days after the first day of January in each year, the sum of twenty dollars, being one dollar per year on each of said water certificates, such payment to be made at the office of said corporation in the city of San Bernardino, state of California;

"And if said sum of twenty dollars be not paid to said corporation in full, at the time and in the manner hereinbefore provided, then said certificate No. 113, and all covenants and agreements therein contained, and the water certificates therein referred to, shall become and be null and void, and all rights thereunder shall be forfeited and shall forever cease and determine, and the foregoing contract shall be void;

"And whenever said certificate No. 113 shall be surrendered to and canceled by said corporation, then the foregoing contract shall be void.

"In witness whereof we have hereunto set our hands and seals this seventh day of July, A. D. 1887.

"RHODES, MITCHELL & HOOPES.

"by C. H. CONDEE, Agent."

The court found for the plaintiff on all the issues, and decreed a sale of the mortgaged property in the usual form, and the defendants appeal from the final decree, and from an order denying their motion for new trial.

1. The appellants contend that the findings which negative the fraudulent misrepresentations charged in the answer and cross-complaint are not justified by the evidence. It will be observed that the averments are that the plaintiff made the false and fraudulent representations by his agent. The evidence shows that the alleged agent was C. P. Condee, whose authority, if he had authority, extended no further than to find a purchaser of the property at a fixed price, and who, in his testimony on the trial, denied that he ever represented that water was piped or conducted to or upon the land sold; or that the right to the use of any water was appurtenant to the land otherwise than as expressed in said water certificates; or that plaintiff would assign to defendants any shares of stock in the water company corporation other than said water certificates, though he may have called those certificates water stock; or that any contract for the erection of a hotel or other buildings had been made by the plaintiff. Such representations as were made by Condee before the sale were first made to the defendant Rhodes (who was acting for the other defendants) at a place on the land where Condee is charged with having falsely represented that the water was then piped, yet there was nothing on the land to indicate that there was either pipe or water anywhere upon it. The water certificates, in the form above set out, were indorsed by the plaintiff and delivered to the defendants' agent, with deed for the land, on June 11, 1887, and received by defendants on July 11, 1887. It is admitted that defendants knew no water had been piped on the land as early as October, 1887, and the evidence strongly tends to show that the defendant Hoopes must have known the same in July, 1887; yet

the defendants made no offer to rescind until December, 1888, about two months after the commencement of this action. There is no evidence nor pretense that the plaintiff personally made any false representation whatever.

As the defendant Rhodes testified that he had been in the real estate business a number of years, and had personally visited and examined the land on two occasions before he made the purchase, it is difficult to understand how he could have been deceived by the alleged representations of Condee as to water being piped on the land at the times he examined it, when he saw no signs of pipes, water, or hydrants, and asked no questions as to where they were; and it is still more difficult to conceive how the defendants could have been deceived as to the purport or nature of the water certificates at the time they accepted those certificates with the deed for the land. Considering these circumstances, which, to some extent, justify the application of the maxim *caveat emptor,* in connection with the testimony of Condee, which denies all the material misrepresentations charged, I think the finding that there was no fraud on the part of the plaintiff is justified by the evidence.

2. Appellants contend that the water certificates are void and of no value, because,—1. "They were issued gratuitously, and consequently amounted to a fictitious increase of the indebtedness of the company"; and 2. They "represent or evidence a division and withdrawal and payment to the stockholders of a part of the capital stock of the company"; and therefore, to the extent of the value of the water, the consideration for the notes and mortgage failed.

There is no pretense that the water company has failed or refused to furnish or deliver the water as per certificates, or has denied its obligation to do so; and the only evidence relating to the matter is to the effect that the water company regards the certificates as valid obliga-

tions which it has always been ready and willing to perform, but it is claimed that their invalidity "is stamped upon their face."

While I am inclined to the opinion that the certificates are valid for what they purport to be, I think it unnecessary, and certainly not desirable, to decide the question in this case, to which the water company is not a party.

As counsel claim that the alleged invalidity of the water certificates appears upon their face, and have pointed to no extraneous fact on which it depends or from which it may be inferred, the defendants must have known all the facts touching such invalidity on July 11, 1887, when they personally received the certificates, and were informed by Mr. Condee that he, as their agent, had executed for them the agreement above set out,—to pay the water company twenty dollars a year. It is not denied that Condee was authorized to execute this agreement. Under these circumstances, if the defendants desired to rescind their purchase on the sole ground that the water certificates were void (and it appears that they had no other ground), they should have offered to rescind promptly, within a reasonable time. A delay of seventeen months, and until two months after the commencement of this action, and thirty-eight days after the appearance of the defendant Rhodes, was unreasonable.

The other points made by appellants' counsel require no special consideration, as those of them which are not founded upon a misconception of facts have no bearing upon the merits of the case as viewed here.

I think the judgment and order should be affirmed.

FOOTE, C., and HAYNE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

[No. 13880. In Bank.—January 30, 1891.]

ALFRED CLARK, APPELLANT, v. CHRISTIAN REIS, RESPONDENT.

POLICE-OFFICER—PAYMENT INTO INSURANCE FUND—VESTED RIGHT—CONTINGENCY.—A police-officer of the city and county of San Francisco has no vested right to the sum paid by him into the insurance fund created under the act of April 1, 1878 (Stats. 1878, p. 879), except upon the happening of the contingencies mentioned in the act.

ID.—DISMISSAL OF OFFICER—REPAYMENT—MANDAMUS—INSUFFICIENT PETITION.—The police-officer, upon his dismissal from the force, is not entitled to a *mandamus* to compel repayment of the sum paid by him into the insurance fund, if the petition is insufficient to bring him within any of the contingencies of the statute which he invokes.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion.

Alfred Clark, in pro. per., and *Jennie Laird*, for Appellant.

George Flournoy, Jr., for Respondent.

The case of *Pennie* v. *Reis*, 80 Cal. 266, subsequently affirmed in 132 U. S., is conclusive of the entire contention of plaintiff.

FOOTE, C.—This action was brought for the purpose of forcing, by writ of mandate, the respondent to pay the appellant, who was the assignee of a claim of a dismissed police-officer, one Pugh, the amount of $256 principal, and costs and damages to the amount of $25.

This sum of money was claimed under and by virtue of an act of the legislature approved April 1, 1878. (Stats. 1878, p. 879.)

It is asserted that the two dollars per month which the police-officer claims to have paid into the fund held by the treasurer was money in which he had a vested

right, and that on his discharge he was entitled to have it returned to him or his representative.

The petition was demurred to as not stating facts sufficient to constitute a cause of action; the demurrer was sustained, and the writ dismissed. From the judgment rendered in the premises this appeal is taken.

The statute under which this right is set up by the plaintiff has received construction from the appellate court in this state in *Pennie* v. *Reis,* 80 Cal. 269, and from the supreme court of the United States in the same case on writ of error. (132 U. S. 471.) These cases hold that a police-officer, such as the assignor of the appellant, never had any claim on the fund involved here, except upon the happening of certain contingencies, mentioned in the act of the legislature of California to which we have just adverted, under which act alone could any right have vested in the plaintiff or his assignor.

The voluminous and argumentative petition filed herein does not, in our opinion, state such facts as bring the appellant within any of the contingencies of the statute which he invokes, and we therefore advise that the judgment be affirmed.

HAYNE, C., and BELCHER, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 13842. Department One.—January 31, 1891.]

HANNAH L. ROSENBERG, BY HER GUARDIAN, ETC., RESPONDENT, v. R. D. DURFEE ET AL., APPELLANTS.

NEGLIGENCE—INDUCING CHILD TO RIDE UPON SWEEP—LIABILITY OF PERSON IN CHARGE.—Inviting and permitting a child eight years old to ride alone, in circumstances of danger, upon a sweep or pole drawn by a horse, and used to propel machinery for pumping water, in consequence of which the child is injured, is negligence on the part of the person in charge of the sweep.

ID.—LIABILITY OF OWNER OF SWEEP.—A verdict against the owner of the sweep will be sustained if it appears that he, knowing that his son was in charge of the sweep at the time of the injury, and that the child was riding upon the sweep alone, in circumstances of danger, at the request of his son, permitted her to remain thus exposed, when he could have prevented her it, though he may have cautioned the child to be careful, and though the child may have said there was no danger.

ID.—INDULGENCE OF CHILD—MOTIVE IMMATERIAL.—The fact that the child was a favorite with the owner of the machine and his son, and that their want of care was the result of a desire to be indulgent to her, does not excuse them from exercising the care required by law to prevent the child from placing herself in danger.

ID.—CONTRIBUTORY NEGLIGENCE OF CHILD.—INSTRUCTION.—An instruction to the jury "that a child of such tender years and immature judgment as to be incapable of knowing, comprehending, and measuring the danger to which it is exposed, and of exercising the necessary precaution in guarding against it, cannot be charged with negligence in exposing itself to the threatened danger," and that in determining the question in connection with the case, they "must consider the age and sex, and all the conditions surrounding the plaintiff at the date of the injury, as disclosed by the evidence," is proper, and does not assume that the machinery causing the injury was dangerous, or tend to mislead the jury upon the question of contributory negligence.

ID.—INSTRUCTION AS TO EVIDENCE OF NEGLIGENCE.—An instruction to the effect that if the sweep was a dangerous place, and if the defendants knowingly permitted the child to ride upon it in circumstances of danger, when its parents or other guardians were not present, if the child was too young to comprehend the danger, and was injured by the machinery, it would be evidence of negligence, is not misleading, and does not purport to tell the jury that the injury was of itself evidence of negligence, unaccompanied by the state of facts culminating in the injury.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion.

Chapman & Hendricks, for Appellants.

The evidence is insufficient to prove that the machinery is at all dangerous. A mere *scintilla* of evidence of negligence is not enough to sustain the plaintiff's burden of proof, but there must be proof of a well-defined negligence. (Wharton on Negligence, sec. 421; Shearman and Redfield on Negligence, sec. 12; Smith on Negligence, *250.) The injury was the result of unexpected accident; and not to foresee an unexpected accident is not negligence. The instructions were erroneous, and misleading to the jury. The verdict would not have been found if the jury had not understood that the occurrence of the injury was sufficient evidence of the negligence of the defendants.

Galbreth & Morrison, for Respondent.

Negligence is relative to circumstances. (*Richardson* v. *Kier,* 34 Cal. 75; 91 Am. Dec. 681.) That which would be ordinary negligence as respects a grown person may be gross negligence as respects a child. (*Schierhold* v. *N. B. & M. R. R. Co.,* 40 Cal. 454; Wharton on Negligence, secs. 21, 76.) No error appears in the instructions of which the defendants can complain.

FOOTE, C.—This action is to recover damages caused to the plaintiff, a child eight years of age, alleged to have resulted from the carelessness of the defendants, in negligently inducing and permitting her "to sit upon a sweep or narrow pole drawn by a horse to propel the machinery for pumping water, then being propelled by and under the control and for the use and benefit of defendants."

It is alleged further in the complaint that the "sweep in its circuit passed above and near to cog-wheels and other portions of said machinery then in motion, thereby exposing plaintiff to the danger of being crushed and mangled therein if she accidentally fell or in any man-

ner was dislodged" from the sweep, and was precipitated upon the machinery; that the defendants well knew of the danger to which the child of tender years was thus exposed, yet they knowingly, carelessly, and negligently suffered her to remain alone on said sweep with no person to guard her, exposed to the danger aforesaid; and that by reason thereof plaintiff fell or was precipitated upon said machinery then in motion, and her left hand was caught, mangled, and lacerated therein, causing the loss of three fingers therefrom, thereby maiming and crippling the plaintiff permanently."

The defendants demurred to the complaint. The demurrer was overruled, an answer filed, and upon the trial a jury returned a verdict for the plaintiff, and assessed her damages at $1,750 and costs.

Judgment was rendered upon the verdict, from which this appeal is taken, and an order denying defendants' motion for a new trial.

There is no dispute but that the child was injured, and suffered the loss of her fingers, while on the sweep and falling upon the machinery.

The defendants' counsel states that the child was seated upon the lever or sweep, and while riding around upon it she lost her balance, and endeavoring to recover herself threw her left hand into the cog-wheel, "and unfortunately just at that moment it was passing under the smaller wheel, when it was caught, and three of her fingers crushed so that they had to be removed."

The defendant Charles Durfee, the son of the other defendant, was in charge of the machinery at the time of the injury; this the father knew, and also that the child was riding around upon the sweep.

A part of the testimony of the child is, that "I was sitting on the sweep. I was going around and lost my balance, and my hand got in the wheel. I was at the cow-corral before I went on the sweep."

"Q. How far away was that from the sweep?"

"A. About half an acre,—not as much as that. Charley [meaning young Durfee] called me, and said, 'Come and take a ride.' First I did'nt hear him, and said, 'What?' Then he said it again,—'Come and ride, Hannah,' and I went over to the sweep, and I saw Mr. Durfee [meaning the father, the other defendant], and he had a shovel in his hand; he was standing there watching me go over. When I was getting on the sweep he said 'Hannah, look out; there might be some danger to your hands and your arms'; and I said, 'Oh no, there won't.' He was in the corn when he said that, and then I went on, and had gone round several times, and I made the horse go when I was on there, and then I lost my balance. First I dropped my hat, and then I said, 'Charley, stop the horse; I want to get my hat.' And he said, 'Pick it up the next time round.' I tried to pick it up, and I lost my balance, and my hand caught in the wheel of the cog. I first got on the sweep near the horse, and Charley said, 'Move up toward the big wheel and machinery.' The way I happened to lose my hat was, the wind blew it off. When I came round and went to pick up my hat, Charley made some motion, and the horse jerked, and that is the way I lost my balance. The horse's name is Doc. My hand got caught in the wheel. I did'nt fall off the sweep, and Charley took me off and carried me to the house. Some of the fingers were cut and the ends of the fingers dropped. Charley took me to the house. He didn't say anything that I remember. Mamma hollared and said, 'Charley, you have crippled my little girl for life.'"

The child is the daughter of a domestic servant of the defendants.

It is claimed by the defendants that the evidence is utterly insufficient to prove that the machinery is at all dangerous; that there is no proof that the defendants were guilty of any negligence. In this connection it is further said that the evidence of the child is contradictory, since upon a former trial she testified as to a ma-

terial matter differently from what she did on this trial, and that therefore her testimony is to be disregarded, and that of the defendants, in contradiction of it, received, in which event it is contended the verdict is unsupported by evidence.

We do not perceive any conflict in the child's evidence, as contended for. Her testimony on the last trial was somewhat fuller than upon the first, but there was no contradiction by one of anything in the other, and nothing to show any unreliability on her part; in fact, she was in many respects sustained by the evidence of the defendants. It does appear, from the evidence, that the child was a favorite, both with the father and son, defendants, and that the want of care which they exercised in permitting a young child like this little girl to get upon the sweep and ride around upon it, involving a risk of her getting injured, was the result more than anything else of a desire to have the child's society by the son, and of a disposition by both father and son to be indulgent to her; but these motives, commendable as they may be in the abstract, cannot excuse them from exercising such care as the law requires to prevent the little girl from placing herself in danger and getting maimed for life.

We do not, therefore, think the verdict unsupported by evidence.

It is further claimed that the instructions asked for and granted were erroneous. One of them is: "The court instructs you that a child of such tender years and immature judgment as to be incapable of knowing, comprehending, and measuring the danger to which it is exposed, and of exercising the necessary precaution in guarding against it, cannot be charged with negligence in exposing itself to the threatened danger. In determining this proposition in connection with this case, you must consider the age, sex, and all the condi-

tions surrounding the plaintiff at the date of the injury, as disclosed to you by the evidence."

We do not understand this instruction to say to the jury, as defendants contend that the court instructed the jury, that the machinery by which the plaintiff received her injury was dangerous. For whether the danger to the child existed or not, they were told it was "as the evidence disclosed it"; that is, existed or not, as the evidence disclosed. There was nothing misleading in telling the jury that they were to consider all the conditions surrounding the plaintiff, including her age and sex, in determining from the evidence as to the danger she may have been exposed to, and her appreciation of it, as bearing upon the question of contributory negligence.

An objection is also made to an instruction that the jury are instructed that if the plaintiff was in peril under certain circumstances, it would be evidence of negligence, thus, as is claimed, telling the jury that the injury while riding on the sweep was of itself evidence of negligence. The instruction is: "If you shall find from the evidence that at the date of the alleged injury the sweep referred to, in its relation to the machinery, was a dangerous place for the plaintiff to ride, and shall find that while the defendants were using said machinery, and the defendants had reason to know the same was dangerous, and they knowingly permitted the plaintiff to sit upon and ride said sweep, in dangerous proximity to said machinery, her parents or other guardians not being present, and you shall further find that because of the tender years and immature judgment of the plaintiff she was incapable of comprehending and guarding against the danger to which she was thereby exposed, and you shall further find that while she was riding under the conditions and circumstances stated, plaintiff's hand was caught and injured in and by said machinery, that it would be evidence of negligence."

As we understand the instruction, it informs the jury that if a certain state of facts exists, culminating in plaintiff's injury, such state of facts is evidence of negligence. We do not see that the clause objected to, in view of all the other portions of the instruction, and others given, would tend to mislead the jury as complained of.

Objection is also made to this instruction: "And finding the facts as above stated, you should further find from the evidence that defendants were father and son, and that the son, while working the machinery for the father, invited, requested, induced, or permitted the plaintiff to ride on said sweep, and that the father knew of her so riding, or had reason to know it was dangerous, and could have removed her, or caused her to be removed, therefrom, or could have stopped said machinery, or caused the same to be stopped, and did neither, but, on the contrary, both he and the son suffered her to remain, such facts would show negligence on the part of the defendants."

It is said that in this instruction it is not clearly stated how the jury were to determine as to the father's responsibility; that the jury might have been impressed with the idea that the father was responsible for the son, as his servant, inviting the plaintiff to ride.

But we do not so understand the instruction. The first part of it is with reference to the state of facts under which it appeared in evidence that the son invited, permitted, and induced the plaintiff to ride under circumstances of danger to her. The second, that the father, *aware* of the danger into which she had been placed by the conduct of the son, had yet permitted her to remain there thus exposed, when he could have prevented her.

The jury were correctly told that if the state of facts with reference to each, somewhat different, existed, that they were both responsible. But we do not understand

that they are told that either is responsible for the negligence of the other.

We perceive no prejudicial error, and advise that the judgment and order be affirmed.

VANCLIEF, C., and BELCHER, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in Bank denied.

[No. 13962. Department Two.—January 31, 1891.]

JOHN H. NORDHOLT, APPELLANT, *v.* WILLIAM F. NORDHOLT, RESPONDENT, AND WILLLIAM F. NORDHOLT, RESPONDENT, *v.* JOHN H. NORDHOLT, APPELLANT.

TRUST — DEED OF INFANT — DISAFFIRMANCE.—An infant cannot avoid or disaffirm a deed made by him in execution of a trust which a court of equity would have compelled him to perform, notwithstanding his infancy.

ID.—CONSTRUCTIVE TRUST—FRAUD—PAROL EVIDENCE.—A constructive trust, arising from fraud, is not within the statute of frauds, and may be proved by parol evidence.

ID.—CONVEYANCE UNDER PAROL PROMISE TO RECONVEY—INTENTION TO DEFRAUD.—A constructive trust arises, and will be enforced in equity, where a minor procures land to be conveyed to himself by his mother under an express promise that he will reconvey it to his brother when arriving at age, with the intention not to perform the promise, and to claim and hold the property absolutely in his own right after arriving at age.

ID.—EXECUTION OF TRUST—DEED—DURESS—PLEADING.—If a trust is executed by a deed made in pursuance thereof, the execution of which is admitted, it cannot be proved that it was made under duress, unless the duress is specially pleaded as affirmative matter in avoidance of the deed.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion.

Gage & Roberts, and *Brousseau, Hatch & Thomas,* for Appellant.

Shinn & Ling, and *Anderson, Fitzgerald & Anderson,* for Respondent.

VANCLIEF, C.—The issues in these two actions were the same, and the actions were consolidated and tried together by the lower court on the same evidence. The court found for respondent on all the issues, and rendered judgment accordingly. The appeals are from the final judgment, and from an order denying motion for new trial.

It appears by the pleadings that the parties are brothers, and that on November 17, 1886, their mother conveyed to the respondent, William, by deed absolute on its face, expressing a nominal consideration of one dollar, an undivided fourth part of certain real property situate in the city and county of Los Angeles; that appellant, John, claimed that this conveyance was in trust for him, and demanded of William a conveyance of the legal title; that on February 10, 1887, Wililam, who was then a minor over the age of eighteen years, conveyed to John by a bargain and sale deed, expressing a nominal consideration of one dollar, the same undivided fourth of the property; that this conveyance was claimed by appellant, John, to have been made in execution of the alleged trust. The respondent denies the trust, and seeks to avoid his deed of February 10th to John, on the ground that at the time of its execution he was a minor of the age of only eighteen years.

If the respondent took and held the legal title in trust for appellant, he cannot disaffirm or avoid his deed in execution of that trust on the ground of his minority, since the execution of the trust was a duty which a court of equity would have compelled him to perform notwithstanding his infancy. (*Elliott* v. *Horn,* 10 Ala. 348; 44 Am. Dec. 488, and cases there cited; *Starr* v. *Wright,* 20

Ohio St. 97; *Prouty* v. *Edgar,* 6 Iowa, 353; Schouler on Domestic Relations, sec. 416.) Therefore the respondents' right to disaffirm his conveyance of February 10th depends upon the issue as to whether he held the legal title in trust for the latter. Upon this issue the lower court found for the respondent, and the appellant contends that this finding is not justified by the evidence.

There is nothing in the deed of the mother to respondent to indicate that the conveyance was in trust; nor is the alleged trust evidenced by any written instrument subscribed by the respondent or his agent. If the trust exists, it arises from fraud, and is therefore a constructive trust, not within the statute of frauds, which may be proved by parol; and this is the theory on which the case was tried.

The evidence tended to prove that the mother, at the request of respondent, had been induced to convey the property in question to her four children; viz., respondent, appellant, and her two daughters,—one undivided fourth to each; that William (respondent) had requested her to convey to him John's fourth in trust for the latter, on account of John's dissipated habits at that time, to be reconveyed to John when he should become temperate, or when William should become twenty-one years of age; that at first the mother consented to this, and, in the absence of John, William presented to her the draught of a deed to this effect, and requested her to execute it; that she refused to execute the deed as drawn, conveying John's fourth to William in trust; but did then (November 8, 1886) execute a deed to William and her two daughters, conveying to each one undivided fourth of the property; that afterwards (November 17, 1886), respondent again requested his mother to convey to him the other fourth in trust for John, which she then did without other consideration than the parol understanding with respondent, and his express promise to her, that he would reconvey that fourth to John as above

stated; that at the time of making this promise to hold in trust and to reconvey to John, respondent did not intend to perform his promise, but intended to claim and hold that fourth absolutely for himself, as he does in these actions; that upon John's claiming and demanding of him a conveyance of that fourth, he executed the deed of February 10, 1887, but with the secret intention of thereafter disaffirming it on the ground of his minority, as he is endeavoring to do in these actions.

These facts, if proved, constitute such fraud as would justify a court of equity in declaring the respondent a mere trustee of the legal title for the benefit of the appellant. (*Brison* v. *Brison,* 75 Cal. 525; 7 Am. St. Rep. 189; *Adams* v. *Lambard,* 80 Cal. 426; *Sandfoss* v. *Jones,* 35 Cal. 481.) And the evidence, positive and circumstantial, on the part of the appellant, seems *prima facie* sufficient to prove them. Indeed, they seem to be supported by a decided preponderance of evidence properly admitted.

But it was claimed by the respondent on the trial, without any foundation therefor in the pleadings, that his deed to appellant of February 10, 1887, was executed under duress *per minas,* which his testimony on the trial had some tendency to prove. This testimony of the respondent as to threats by John was objected to by counsel for appellant, on the ground that it was irrelevant to any issue made by the pleadings. The objection was overruled by the court, and counsel for appellant excepted. Thereupon respondent testified as follows: "Well, at that time John thought he had a quarter-interest in this property, and he used to ask me for the property all the time. At that time he was drinking very heavily, and he told me several times if I did not give him up that property he would do me up, or something to that effect. I felt the influence of him, and I talked with Judge Ling about it, and he said if I gave him a deed I could dis-

affirm it after a while, and keep him quiet for the present. So with that I made a deed to him of one quarter-interest in the property. John would speak to me about the matter on an average every other day; he would say that he had an interest, a quarter-interest, in the property, and that he wanted it,—he wanted a deed to that property."

I think the court erred in overruling the objection to this testimony, to the possible, if not probable, prejudice of the appellant. The conveyance of February 10, 1887, under the circumstances of John's claim and demand, tended to justify an inference that the respondent then recognized the trust and his obligation to convey the property to John, which corroborates and strengthens the other evidence of the trust; but, if the conveyance was coerced by duress of any kind, no such inference could be drawn. Why, if respondent did not recognize the trust, did he execute the deed of February 10, 1887? This question, so pertinent under the circumstances, is answered by evidence of duress. But since the execution of the deed was expressly admitted by respondent's pleadings, and the duress sought to be proved was affirmative matter in avoidance of the deed, it should have been specially pleaded; else no evidence to prove it should have been admitted against the objection of appellant. (*McCreary* v. *Marston,* 56 Cal. 403; *McCrery* v. *Duane,* 52 Cal. 262; *Miller* v. *Sharp,* 48 Cal. 394; *McComb* v. *Reed,* 28 Cal. 281; 87 Am. Dec. 115.)

The only matter pleaded in avoidance of the deed is the minority of the respondent, which, we have seen, is not available if the respondent held the property in trust as alleged, and as the evidence tends to prove.

For the error in admitting respondent's testimony as to duress, I think the judgment and order should be reversed, and the causes remanded for a new trial.

BELCHER, C., concurred.

HAYNE, C., concurring.—I concur in the foregoing opinion, but go further. I think it would make no difference if the duress were pleaded in the fullest manner. The deed of the respondent can no more be avoided on the ground of duress than it can on the ground of minority. A court of equity will not lend its assistance to a man to set aside, on the ground of duress, an execution of a valid trust. That would be to assist a fraud.

This question fairly arises, and if it be not disposed of now, the case will probably come back again.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are reversed, and the causes remanded for a new trial.

Hearing in Bank denied.

[No. 13961. Department Two.—January 31, 1891.]

C. W. HARVEY, RESPONDENT, v. J. L. HADLEY ET AL., APPELLANTS.

VENDOR AND PURCHASER—FRAUDULENT REPRESENTATIONS OF VENDOR—PROSPECTS AFFECTING VALUE OF LAND SOLD—MEASURE OF DAMAGES.—In estimating the damages to a vendee for fraudulent representations of the vendor in regard to prospects affecting the value of the land sold, where part only of the representations made are untrue, it is not proper to consider what would be the value of the land if all the representations made were untrue, nor what its value would be exclusive of an existing prospect, in respect to which the representations were partially false; but the difference should be taken between the price paid by reason of the false representations as to its value, supposing them to be true, and the actual value of the land at the time of purchase, in view of prospects actually existing.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

Wells, Guthrie & Lee, and *J. A. Donnell,* for Appellants.

In actions for deceit or breach of warranty in sales of personalty or realty, the measure of damage is the difference between the actual value of the property at the time of purchase, and its value if the property had been what it was represented or warranted to be. (Bigelow on Frauds, ed. 1888, p. 627; *Estell* v. *Myers,* 56 Miss. 800–806; *Morse* v. *Hutchins,* 102 Mass. 439; Field on Damages, sec. 512; *Cooper* v. *Schlesinger,* 111 U. S. 148, *Woodward* v. *Thacher,* 21 Vt. 580; 52 Am. Dec. 73; *Muller* v. *Eno,* 14 N. Y. 597; *White* v. *Smith,* 54 Iowa, 233; *Markel* v. *Monday,* 11 Neb. 213; *Wright* v. *Roach,* 59 Me. 600; Sedgwick on Damages, 5th ed., 333, 655; *Foster* v. *Kennedy,* 38 Ala. 359; 81 Am. Dec. 56.) The findings show that this difference is five thousand dollars. The specific findings must control the general findings and the judgment. (*People* v. *Reed,* 81 Cal. 76; 15 Am. St. Rep. 22; *Geer* v. *Sibley,* 83 Cal. 1; *Overacre* v. *Blake,* 82 Cal. 77.)

C. W. Pendleton, and *Anderson, Fitzgerald & Anderson,* for Respondent.

The findings show that the real value of the property with the prospect then existing was five thousand dollars, and that the damage to defendant was three thousand dollars. The finding of value without such existing prospect cannot be considered.

VANCLIEF, C.—On July 8, 1887, the plaintiff and defendants entered into an agreement in writing, whereby the plaintiff agreed to sell to defendants a certain tract of land situate in the town site, or projected town, of Whittier, in the county of Los Angeles, for the sum of eight thousand dollars, three thousand dollars of which had been paid before the commencement of this action. For the residue (five thousand dollars) the defendants made their promissory note of even date with the con-

tract, payable on or before June 7, 1888, with interest at ten per cent per month, to be compounded semi-annually.

This action was brought to recover the amount due on the note, and to foreclose the vendor's lien upon the land.

The defense is, that the defendants were induced to purchase the land by false and fraudulent representations of the plaintiff, to the damage of the defendants. The court found that plaintiff made the representations charged, and that the greater portion of them were false and fraudulent, to the damage of defendants in the sum of $3,000, and deducted this sum from the note, and rendered judgment for the plaintiff for the residue and interest, amounting to $2,595.

The defendants appeal from the judgment on the judgment roll, and contend that the finding of only three thousand dollars damages is inconsistent with the twelfth finding, by which, they say, it appears that the damages were five thousand dollars. This is the only point made, and to dispose of it in favor of the respondent, I think it is only necessary to read the twelfth finding in connection with the eighth and thirteenth findings.

The twelfth finding is as follows: "That the value of said land, without any prospect of a college or street-car line being built as represented by the plaintiff, and without any contract being let for the same, or either of them, was, at the time of the purchase, the sum of three thousand dollars; that if the contract for the building of said street-car line along Hadley Street to the southwest corner of said land to Painter Avenue had been let as represented by plaintiff, said land would have been at the time of the purchase of the market value of six thousand dollars; that if said plaintiff had in good faith intended to build said college, and the Quakers had agreed or determined to build said college, and the contract for building said street-car line had been let at the time of mak-

ing said contract, as represented by plaintiff, said land would then have been of the market value of eight thousand dollars; and that said land as it was, and with the prospect of the building of said college then existing, was of the market value of five thousand dollars."

The court here finds what would have been the value of the land at the time of purchase under four different conditions of facts: 1. In case all the representations of the plaintiff had been entirely false; 2. In case the representations as to the contract for building the street-car line had been true; 3. In case all the representations made by plaintiff had been true; and 4. The value of the land, "*as it was,* with the prospect of the building of the college *then existing,*" as appears in the eighth finding, wherein it is found "there were general rumors afloat and a prospect that said college would be built as stated by plaintiff."

The value of the property in the first two supposed cases is immaterial, even according to the rule of damages claimed by counsel for appellant, viz.: "The measure of damage is the difference between the *actual value* of the property *at the time of purchase,* and its value *if the property had been what it was represented or warranted to be.*" In order to estimate the damages by this rule, only the third and fourth branches of the twelfth finding are necessary. The third finds that if the property had been what it was represented to be, its value would have been eight thousand dollars. The fourth finds that the actual value of the property as it was at the time of purchase (one part of plaintiff's representations then being true) was five thousand dollars. Thereupon the court estimated defendant's damages to be three thousand dollars, the difference between these two valuations.

Counsel for appellants are mistaken in assuming that the court found the representations of plaintiff to have been entirely false. The court found that a part of plaintiff's representations as to the college was true, and

considered this in estimating the actual value of the property at the time of the purchase, but excluded it from the estimate (1), whereby the value was found to be three thousand dollars.

I think the judgment accords with the findings of fact, and that it should be affirmed.

Foote, C., and Hayne, C., concurred.

The Court.—For the reasons given in the foregoing opinion, the judgment is affirmed.

Hearing in Bank denied.

[No. 13888. Department Two.—January 31, 1891.]

SAN DIEGO FLUME COMPANY, Appellant, *v.* LEVI CHASE, Respondent.

Water Rights—Construction of Contract.—A contract for the supply of water for irrigation, construed, and *held* to entitle the defendant, daily, to two and one quarter inches of water, miners' measure, under a four-inch pressure.

Appeal from a judgment of the Superior Court of San Diego County.

The facts are stated in the opinion of the court.

Shaw & Holland, for Appellant.

Hunsaker, Britt & Goodrich, and *Levi Chase,* for Respondent.

The Court.—This action was brought for the purpose of having a contract for the sale of a water right for irrigation purposes reformed, and that it be declared that the amount of water "conveyed to and owned by the defendant be limited by said contract to two and one quarter inches of water, miners' measure, under a four-

inch pressure, and no more, and that he be entitled and required to take the same in accordance with such reasonable rules and regulations as may be established from time to time by plaintiff," and for such other equitable relief in the premises as should be proper.

The contract sought to be reformed is made a part of the complaint, and shows that plaintiff and appellant, who is the party of the first part, "contracts and agrees that the party of the second part [defendant and respondent here] shall have the right to make two connections with the said flume of said party of the first part of a two-inch pipe entering the side thereon, near the bottom. . . . . The pipe aforesaid shall be extended from the points of connection with said flume to and be connected with the pipe system of the party of the second part in said orchard, and thereafter all water drawn from said flume shall be taken and drawn from said pipes, for the purpose of irrigating, through standard pipes of not more than one and one half inch diameter, or carried through one and one one half inch rubber hose, as hereafter provided; that the party of the first part will convey to the party of the second part a water right of two and one quarter ($2\frac{1}{4}$) inches of water, miners' measure, under a four-inch pressure, to be taken and used as hereinafter provided, and subject to the conditions usual with said party of the first part in the sale of water rights to other parties; that the water to be taken and had by the party of the second part under this agreement, and under and by virtue of his water rights aforesaid, shall be measured, estimated, and determined by the amount of water that he may draw from said pipes through one and one half inch iron pipe standards in his said grounds, and to be used exclusively thereon, from the first day of May to the first day of November, both inclusive, during ordinary seasons; but should an extraordinarily dry spring or fall necessitate a longer use of water for irrigation, he shall have the right to

use and take the same through said pipes in the same way as hereinbefore provided; but in that case shall pay the party of the first part an extra amount therefor, proportionate to the sum hereinafter specified to be paid by the party of the second part for the six months' use first aforesaid."

A demurrer to this complaint having been overruled, the defendant answered, admitting the contract to be as set out in and attached to the complaint, and denying all other allegations, and also filed an amended cross-complaint (a demurrer to the original having been sustained), the *gravamen* of which was, that under this contract he was entitled to have a specific performance of it, so that the effect thereof would be that he was to take and receive (through two two-inch pipes placed in the side of the flume of the plaintiff, from whence water was to be drawn, and connected with the defendant's pipe system, by which he irrigated his fruit farm) *all the water he might require for the irrigation of his said property, and for the use of the stock and persons kept or employed thereon, that he might draw from one and one half inch standard pipes in his irrigation system*, and for damages and other relief, consisting, among other things, of the restoration of the two-inch pipes connected with the flume as they had originally stood, and to remove all natural obstructions to the flow of the water in these pipes, the defendant having been limited as to the flow of water by an obstruction erected by the plaintiff at the flume so that only one and one eighth inches would flow into each of the two-inch pipes.

An answer to this cross-complaint was filed.

When the case came on for trial, the plaintiff abandoned its action for a reformation of the contract. Then the defendant moved for judgment on the pleadings in the cross-action for the specific performance of the contract as he claimed it was to be interpreted, and for nominal damages, he alleging that the plaintiff, by its

answer to the cross-complaint, had admitted all the material allegations of that pleading. This motion was sustained, and judgment entered in accordance therewith. The plaintiff appeals.

The real matter to be determined on this appeal is, how much water the defendant was entitled to, under the contract to take from the plaintiff's flume, the appellant claiming it to be only two and one quarter inches under a four-inch pressure, the respondent claiming it to be all the water he could take through his two two-inch iron pipes connected with the flume, to be distributed by means of two one and one half inch iron standard pipes.

The construction given by the trial court to the contract, as appears by its decree or judgment, is not correct.

The quantity of water which the defendant was to get from the plaintiff's flume for a certain specified sum of money was two and one quarter inches, miners' measure, under a four-inch pressure, from "the first day of May to the first day of November, both inclusive, during ordinary seasons; but should an extraordinarily dry spring or fall necessitate a longer use of water for irrigation," he is to have the right to use "and take the same through said pipes in the same way" as he took the two and one quarter inches, for a specified term, as above set forth; but in that case he must pay the plaintiff an extra amount therefor, proportionate to the sum he was ordinarily to pay for the season from the first day of May until the first day of November, inclusive. But the quantity of water to be taken was to be admeasured to him through his two two-inch iron pipes connected on his land with two one and one half inch standard pipes. The method of taking this quantity of water does not effect the amount which the first clause of the contract relating thereto fixed, unless a construction be given to that clause which will make it entirely inoperative. It reads thus: "That the party of the first part will convey

to the party of the second part a water right of two and one quarter ($2\frac{1}{4}$) inches of water, miners' measure, under a four-inch pressure, to be taken and used as hereinafter provided, and subject to the conditions usual with said party of the first part in the sale of water rights to other parties." But giving it the construction we have, it is in entire harmony with the clause following: "That the water to be taken and had by the party of the second part under this agreement, and under and by virtue of his water rights aforesaid, shall be measured, estimated, and determined by the amount of water that he may draw from said pipes through one and one half inch iron pipe standards in his said grounds." The one clause refers to the *amount* of water to be taken, the other to the manner of its taking.

Two and one quarter inches of water, miners' measure, under a four-inch pressure, it is the privilege of the defendant to take and distribute daily, as he pleases, over his land through its pipe system attached to the plaintiff's flume. And this daily quantity of water he is entitled to for the season heretofore set forth. But he is not entitled to any more during that season, except, as stated in the contract, when an "extraordinarily dry spring or fall necessitates a *longer* use of water for irrigation," when he is to get it by paying a sum of money proportionate to the sum he was ordinarily to pay for water during the season as above stated.

Judgment reversed.

A petition for a hearing in Bank having been filed, the following opinion was rendered thereon on the 25th of February, 1891:—

The Court.—A rehearing of this cause is denied, but so much of the opinion and decision heretofore filed as limits the respondent to the use of two one and one half inch standard pipes is set aside. The contract does not limit respondent to any particular number of standard pipes in conducting his irrigation.

[No. 13606. Department Two.—January 31, 1891.]

S. CAMPODONICO, RESPONDENT, *v.* THE OREGON IMPROVEMENT COMPANY, APPELLANT.

MORTGAGE ON GROWING CROPS—STORAGE OF HARVESTED CROP—WAREHOUSE RECEIPT.—The lien of a mortgage on growing crops is not lost by the mortgagee permitting the mortgagor to store the harvested crop in a warehouse, under an agreement between them that it should be stored in the name of the mortgagee, although the property is stored in the name of the mortgagor, against his protest that the warehouse receipt should show that it was stored for the mortgagee.

ID.—NEGLECT OF WAREHOUSEMAN.—The neglect or refusal of the warehouseman to issue a receipt showing that the property was stored in the warehouse for the mortgagee does not destroy the mortgage lien in favor of an assignee in insolvency of the mortgagor.

ID.—ASSIGNMENT OF WAREHOUSE RECEIPT — PREFERENCE — INSOLVENCY OF ASSIGNOR.—The assignment of the warehouse receipt to the mortgagee by the mortgagor on the day of and before the filing of the latter's petition in insolvency, is not void as a preference under section 55 of the Insolvent Act, where the value of the property is less than the debt for which it was mortgaged.

ID.—EFFECT OF ASSIGNMENT—TITLE TO PROPERTY IN WAREHOUSE—INSOLVENCY OF ASSIGNOR.—The assignment of the warehouse receipt, conceding it to be a transfer of the legal title to the property described in the receipt, is nevertheless valid as against an assignee in insolvency of the mortgagor appointed in proceedings subsequently commenced by him on the day of the assignment.

ID.—CONVERSION BY WAREHOUSEMAN—SALE BY ASSIGNEE IN INSOLVENCY—ACTION BY MORTGAGEE.—The mortgagee of the growing crops, who is also assignee of the warehouse receipt of the harvested crops, may maintain an action for damages for conversion of the crops against the warehouseman, if the latter delivers them to a vendee of the assignee in insolvency.

APPEAL from a judgment of the Superior Court of San Luis Obispo County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Graves, Turner & Graves, for Appellant.

Venable & Goodchild, for Respondent.

The COURT.—Action to recover damages for the conversion, by defendant, of certain personal property, con-

sisting of beans and barley grown upon land farmed by one Dodge, in the county of San Luis Obispo, in 1888. Judgment was rendered in favor of the plaintiff, and from this, and an order denying its motion for a new trial, defendant appeals.

The court below found, in substance, that in May, 1888, the said Dodge duly mortgaged to plaintiff the said beans and barley then growing to secure the sum of fifteen hundred dollars and interest, which mortgage was properly recorded; that between May 31, 1888, and October 27, 1888, the said Dodge, at the request of plaintiff, had the said property hauled from the land on which it was grown, and delivered to the defendant at its warehouse, instructing the person hauling it to store the same as the property of plaintiff, in accordance with plaintiff's request; that upon delivery of the first lot hauled, the defendant was notified that said property belonged to plaintiff, and that the delivery was made for him; that from time to time, as delivered, the defendant gave to the teamster of Dodge who hauled it tags of weight, reciting that the same was received from said Dodge, and not naming the plaintiff. On October 27, 1888, Dodge surrendered these tags to defendant, and requested the agent in charge of defendant's warehouse to issue a warehouse receipt to plaintiff for said property, but that the agent issued such receipt in favor of said Dodge, the said Dodge protesting that the same should show that said beans and barley were stored for plaintiff. Plaintiff did not know that the property had been stored in the name of Dodge, until October 28, 1888, when he was informed of that fact by Dodge, and of the further fact that the same had been attached on the day before by one Aaron, in a suit against Dodge. On the 29th of October, Dodge indorsed and assigned the warehouse receipt to plaintiff, and the defendant was on the same day notified by plaintiff that he was the owner of the property. After this assignment, and upon the same day, Dodge filed his peti-

tion in insolvency, and was thereupon adjudged insolvent. Aaron was appointed assignee in the insolvency proceedings, and, as such, sold the property in controversy to one Sinsheimer, and on December 17, 1888, the defendant, by order of said Sinsheimer, shipped the same, and without the knowledge or consent of plaintiff, to the consignee of said Sinsheimer in San Francisco.

1. These findings support the judgment. The lien of respondent's mortgage was not lost by his permitting the mortgagor, Dodge, to haul the mortgaged property from the land on which it was grown, and its storage in defendant's warehouse, under the circumstances disclosed in the findings. (*Byrnes* v. *Hatch,* 77 Cal. 244.) The neglect or refusal of defendant's agent to issue a receipt showing that the property was stored in the warehouse for the plaintiff did not change the effect of the agreement, made between plaintiff and his mortgagor, Dodge, as to the way in which it should be stored, so as to destroy the mortgage lien in favor of the assignee of the insolvent, Dodge. The attachment proceedings need not be considered, as the attachment was dissolved when Dodge was adjudged insolvent.

2. The assignment of the warehouse receipt made by Dodge to the plaintiff on the day of the filing of Dodge's petition in insolvency was not void as a preference under section 55 of the Insolvent Act. As the value of the property was less than the debt for which it was mortgaged, nothing was withdrawn from the reach of the assignee representing the creditors of Dodge, and if it be conceded that the effect of this transaction was in form a transfer of the legal title to the property described in the receipt, it was nevertheless valid as against the assignee. (*Catlin* v. *Hoffman,* 2 Saw. 486.)

The other assignments of error do not require special discussion.

Judgment and order affirmed.

[No. 12944. Department Two.—January 31, 1891.]

F. P. McLENNAN, Administrator, etc., Appellant, *v.* THE BANK OF CALIFORNIA, Respondent.

New Trial—Failure to File Decision in Time—Directory Statute.—Section 632 of the Code of Civil Procedure, requiring the judge of the trial court to file his decision with the clerk within thirty days after the submission of the cause, is directory merely, and his failure so to do is not ground for a new trial.

Banks—Liability for Note Collected—Payment to Cashier.—A bank is not liable to the payee for money collected upon a note left in the hands of its cashier for collection in his individual capacity, and which it has collected at the cashier's private request, and placed to his individual credit, and paid out to him on his checks drawn against his account as a depositor with the bank.

Id.—Evidence — Books of Bank — Dealings with Customers—Counterclaim.—In an action by the payee of the note to recover the money collected by the bank, the books of the bank showing the original entries of transactions between itself and its customers are admissible in evidence for the bank, for the purpose of showing an alleged indebtedness of the plaintiff to the bank, set up by way of counterclaim.

Id.—Counterclaim Barred by Limitation.—The fact that the counterclaim of the bank was barred by the statute of limitations does not render the books of the bank inadmissible as evidence to show the original indebtedness of the plaintiff to the bank.

Id.—Inequitable Demand—Review of Evidence—Declarations of Deceased Cashier — Credibility of Witness.—It appearing from the evidence that the payee of the note had neglected to make any inquiry of the bank respecting its collection, or made any demand for any part of the money collected for six years after the collection, and until after the death of the cashier, when a still larger indebtedness of the payee to the bank had become barred by limitation, and that the relations between the payee of the note and the cashier were of a most friendly, personal character, testimony of the payee that the deceased cashier had declared to him that the note had been collected by the bank for the payee and placed to the payee's credit will not be sufficient to disturb the findings in favor of the bank, if his testimony, resulting from want of recollection or otherwise, is self-contradictory, and in some of its statements inherently improbable.

Appeal from an order of the Superior Court of the city and county of San Francisco denying a new trial.

The facts are stated in the opinion.

George B. Merrill, and *T. I. Bergin,* for Appellant.

Newlands, Allen & Herrin, for Respondent.

Foote, C.—This action was brought by Donald McLennan, now deceased, and was tried, judgment entered, and notice of intention to move for a new trial served and filed during his lifetime. After his death his administrator, the present plaintiff, was substituted, and a new trial refused.

From the order made in the premises the plaintiff appeals.

The action is to recover of the defendant, a banking corporation, the sum of ten thousand dollars and interest. It is alleged in the complaint that on the twenty-seventh day of November, 1869, the Mission and Pacific Woolen Mills, Consolidated, a corporation, made, executed, and duly indorsed and delivered to the plaintiff a certain promissory note for ten thousand dollars; that upon the receipt of that note, the plaintiff deposited it with the defendant, to be collected in due course of banking business; that the note and certain accrued interest thereon were paid by the maker of the note to the defendant on the twenty-sixth day of April, 1870; that afterwards, on the 26th of August, 1875, the defendant closed the doors of its bank, stopped payment, etc., and refused to pay the plaintiff the money collected by it for him.

The defense was, that the note was never received by the bank from the plaintiff for collection, but was given by the plaintiff into the hands of W. C. Ralston, to be collected and the proceeds used by him for his own benefit, and that, in accordance with this, the money was collected by the bank at the request of Ralston, placed to his credit, and paid out to him on his checks drawn against his account as a depositor with the bank.

The statute of limitations was set up, and also certain demands against the plaintiff held by the bank were pleaded by way of set-off to an amount exceeding the

claim of the plaintiff. The court found, in favor of the defendant, "that the plaintiff never deposited the said note of November 27, 1869, with the defendant to be collected; that the plaintiff never deposited said note of November 27, 1869, with the defendant." It further held that the plaintiff's cause of action, if it had been otherwise good against the bank, which it was not, was not barred, but that the cause of action by the plaintiff on its counter-demands against the defendant was barred by the statute of limitations. So that upon the findings as made, judgment was rendered against the defendant for costs.

The first ground urged for a reversal of the order denying a new trial is, that the court did not give its decision and file it with the clerk *within thirty days* after the cause was submitted for decision, under section 632 of the Code of Civil Procedure.

The provision of the statute in question is directory merely. (*Broad* v. *Murray,* 44 Cal. 228; *McQuillan* v. *Donahue,* 49 Cal. 157; Hayne on New Trial and Appeal, sec. 238, note 13.)

The main ground, as it seems, urged by the appellant for the reversal of the order is, that the trial court misconstrued the evidence given in the cause, and that the findings against the plaintiff are not in accord with such evidence, if properly and legally considered. The only oral evidence in the case introduced by the plaintiff to sustain the contention that the note was placed in the hands of Mr. Ralston, the then cashier of the Bank of California, for collection by the bank, the proceeds to be placed therein to the credit of the plaintiff, was the testimony of Donald McLennan and the witness Tibbey, the latter having been at one time an employee of the bank, but was not at the time he testified. Mr. Ralston, the only other person who might have testified as to the exact nature of the transaction by which he took the note from McLennan for collection, was dead at the time

of the trial. So that whether he took it as cashier of the bank or in his individual capacity must rest mainly, if not entirely, upon whether the emphatic and positive statements made by McLennan and Tibbey ought to have been given full credit by the trial court.

The note, which it is claimed that Ralston collected and had the proceeds placed to his credit in the bank, and drew it out by check, and used it for his own private purposes, was made in renewal of a *second* note, which last had been in the hands of Tibbey, a friend of McLennan's, to be collected by Tibbey for McLennan. When it became due, Tibbey placed it in another bank for collection, and Colonel Fry, the president of the mill corporation, the maker of the note, was not ready to pay it, and told Mr. Ralston, who was largely interested in the corporation, of the fact of the inability of the corporation at that time to meet the note, and that Tibbey had it for collection. Ralston was, as appears abundantly in the record, a man and a friend in whom McLennan had the utmost confidence, at whose instance the latter had several times given his name on various notes, and had at Ralston's personal request loaned at one time thirty thousand dollars to the mill corporation. In fact, it would appear as if McLennan, on account of the confidence he had in Ralston, and his intimate personal and business relations with him, as shown by McLennan's evidence, if he had been requested to do it, would at any time have intrusted or loaned to Ralston either his name, credit, or money.

Under these existing personal relations between Ralston and McLennan, Mr. Ralston inquired of Tibbey about this second note. He was informed that the note was held, in confidence, as agent, by Tibbey; then Tibbey saw McLennan, who told him to tell Ralston whom the note belonged to. This was done, and an interview occurred between Ralston, Tibbey, and McLennan, by means of which Ralston became possessed of the note,

had it renewed, and placed the renewed note in the bank for collection, as deposited for his own account individually, and used the proceeds personally.

Another circumstance appears in the case in the evidence of McLennan; and that is, that although he says that Ralston told him the money had been collected on the note, and placed to McLennan's credit in the Bank of California, that he never once made any inquiry of any one else about the bank if such was the fact, never made any demand for it for years afterwards, or during Ralston's lifetime, except to Ralston, and never drew a check against it, or made any effort to get it, as is usual in cases when men have money on deposit in banks.

After Ralston's death, and during the temporary suspension of the bank, this action is brought, and when a large alleged indebtedness of McLennan to the bank is barred by the statute of limitations, and his claim, being against a bank, cannot be likewise barred. All these facts were before the trial court.

In addition to certain suspicious facts and circumstances, which time does not admit of mention, it appears in the testimony of McLennan that he first positively and emphatically declared that he had no interest or claim in the third note, and afterwards declared that he had; the reason which he assigns for not claiming this interest in the first instance being as stated by himself, in answer to questions by his counsel, which questions and the answers are:—

"Q. This morning you were asked in regard to the first and second notes, and you said that the third note was not yours. I should like to know if you have any explanation to make about that.

"A. Well, I made a great mistake this morning, because I thought that not having any physical connection in the third note, that it might not belong to me, or it might prejudice my standing in court. I at once saw my mistake, and beg now to correct it. I claim owner-

ship in that note, the same as the other two notes. I claim ownership in any note having any connection with the transaction.

"Q. You also said that you never authorized or ratified the taking up of the third note. What do you mean by that?

"A. Well, I mean to say by that, whatever the bank done in connection or in the shape of an accommodation to the mill, of course it was no doings of mine, any more than the proceeds from any accommodation they might afford the mill. I claim the payment,—claim the money."

From this it seems as if the witness thought himself justified in making his recollection conform to his supposed interests, and that he was ready to and did make what he calls a "mistake" in his own favor as to the statement of a fact or a claim of interest, when to do otherwise, and state the fact or claim correctly, would, as he said, *"prejudice my standing in court."*

Space forbids us to enumerate all the other instances, either, as claimed, resulting from the want of recollection, or otherwise, where it would seem that the witness caused "intestinal" conflicts in his testimony, or made statements inherently improbable in their nature. But such appears to us to have been the character of his testimony, and under such circumstances we do not see, in view of the decisions of the appellate court of this state, that the trial court was compelled to regard as true his statement as to how Ralston became possessed of the note. (*Crook* v. *Forsyth,* 30 Cal. 662; *Bernal* v. *Wade,* 46 Cal. 667; *Blankman* v. *Vallejo,* 15 Cal. 639–646; *Baker* v. *Firemans Fund Ins. Co.,* 79 Cal. 34–41; *Mogk* v. *Peterson,* 75 Cal. 501.)

Mr. Tibbey's mistakes and corrections also leave it doubtful if his recollection of the facts just as they occurred when Ralston took the note is to be relied on; and besides, the peculiar relations between Ralston and

McLennan, and all the facts and circumstances surrounding the transaction, and the conduct of the plaintiff afterwards, as above adverted to, might well cause the trial judge to doubt the correctness of the memory of the witness.

It is further claimed that the books of the bank showing the alleged indebtdness of the plaintiff, as set up by the counterclaim, were inadmissible in evidence. The transactions of a bank relating, in large measure, with its customers, to the receipt of money from them and the paying of it out to them on loan or check, it would seem as if their books showing the original entries of such transactions are admissible, and competent evidence for the bank. (Morse on Banks and Banking, 3d ed., sec. 295, note, pp. 510, 511; *Union Bank* v. *Knapp,* 3 Pick. 96, 109; 15 Am. Dec. 181; *Watson* v. *Phœnix Bank,* 8 Met. 217, 220, 221; 41 Am. Dec. 500.)

Even if the claim of the defendant was barred by the statute of limitations, this did not render this evidence to show the original indebtedness inadmissible, for it might happen in such a case that the party introducing it would be able to show facts which would take it out of the operation of the statute, and after the date of the claim and its nature are shown, it then becomes a question for the court to determine, from all the evidence, whether such claim is or not enforceable under the statute. While a recovery on such claim may be barred, this does not render proof of the claim in the first instance incompetent. Besides, the findings of the court are, that the claim was barred, hence the plaintiff is not prejudiced. The same rule applies to the objection to the admission in evidence of the promissory note for $16,841.75, executed by the plaintiff to the defendant.

There are other objections urged to the admission or exclusion of evidence. We have given to arguments made and authorities cited minute and thorough consideration, and have examined the transcript carefully, but we can-

not see wherein any prejudice could have been suffered by the plaintiff.

The decision of the court was unquestionably correct, and even if some evidence was admitted and other evidence excluded, perhaps improperly, it yet appears that, even then, the evidence unobjected to in the record was unaffected, as that admitted against objection and that excluded was not of sufficient importance to change the result. Perceiving no prejudicial error in the record, we advise that the order appealed from be affirmed.

BELCHER, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the order appealed from is affirmed.

Hearing in Bank denied.

[No. 13659. Department One.—February 2, 1891.]

WILLIAM A. FRICK ET AL., APPELLANTS, *v.* W. E. MORFORD, RESPONDENT.

STREET ASSESSMENT—VALIDITY—NEW ASSESSMENT.—If a street assessment is valid, the superintendent of streets cannot be required to make another assessment.

ID.—MANDAMUS—PLEADING—APPLICATION.—An application by contractors for street work for a *mandamus* to compel the superintendent of streets to make a new assessment for the work, which alleges that payment of the previous assessment was refused because of excess of work, must clearly set forth facts showing that the previous assessment was void, else the writ should be refused.

ID.—EXCESS OF STREET WORK—ERRONEOUS PLANS AND SPECIFICATIONS—WORK OUTSIDE OF LIMITS.—Street work done according to the plans and specifications in the office of the city surveyor, which call for work outside of the limits authorized by the resolution of intention, is done without authority as to the work outside of those limits, and the contractors are not entitled to an assessment for the excess.

ID.—LOCATION OF LOT ASSESSED.—If the lot assessed wholly fronts upon the work done in excess of authority, it cannot be held liable for any assessment; but if it fronts in whole or in part upon work authorized by the resolution of intention, the assessment against it will not necessarily be rendered

void by the fact that the entire assessment purports to make a charge upon lots not within the limits fixed by the resolution of intention.

ID.—SEGREGATION OF EXCESS.—An excess of work done outside of the limits fixed by the resolution of intention will not invalidate an assessment against lots within those limits for work which was authorized by the resolution, if the cost of the work was estimated by the linear foot, so that the cost of the excess can be easily segregated from the cost of the remainder.

ID.—EXCESS OF WORK WITHIN PROPER LIMITS—APPEAL TO CITY COUNCIL.—An assessment for street work embracing only the frontage covered by the resolution of intention, but including the expense of an excess of work done in accordance with the specifications, but not authorized by the resolution, may be corrected by appeal to the city council, and the failure to take such appeal is conclusive upon the owner as well as the contractor.

ID.—LOT IMPROPERLY ASSESSED—APPEAL BY CONTRACTOR.—If a lot improperly assessed is partly within and partly without the limits of the work authorized by the resolution of intention, it is the duty of the contractor, under section 11 of the act of March 8, 1885, to appeal to the city council to have the assessment corrected, and upon his failure to take such appeal, he is concluded, and cannot have the assessment corrected in any other mode.

ID.—APPEAL BY OWNER.—An illegal assessment creates no lien upon the land assessed, and the owner thereof is not a person "aggrieved," and is not required to appeal to the city council.

APPEAL from an order of the Superior Court of Los Angeles County denying a petition for a writ of mandate.

The facts are stated in the opinion of the court.

Hugh J. & William Crawford, for Appellants.

Charles McFarland, and *Sargent & Harpham,* for Respondent.

HARRISON, J.—The plaintiffs applied to the superior court of Los Angeles County for a writ of mandate to the superintendent of streets of the city of Los Angeles, directing him to make an assessment for certain work done by them in laying a sewer in Seventh Street, under a contract with the city authorities. In their application they aver that they entered into a contract with the superintendent of streets, by which they agreed to lay

the sewer "in accordance with plans and specifications therefor on file in the office of the city surveyor, ... but said plans and specifications were faulty and erroneous in this: that about eight feet of sewer more were required by said plans and specifications to be laid, and were laid by affiants, than was authorized by the resolution of intention"; that they had performed their work to the satisfaction of the superintendent of streets, and that he accepted the same and made an assessment therefor, "and in said assessment included the cost and incidental expenses of said unauthorized eight feet"; that they brought an action to recover the amount of a portion of the assessment against one H. L. Williams, who had refused to pay the same, "because of said excess of work," and that they had dismissed the said action.

The defendant demurred to the application, and his demurrer having been sustained, the plaintiff declined to amend, and appealed to this court from the order denying the writ. The plaintiffs do not in their application aver in terms that the assessment that had been issued was void, nor can we say from the facts averred by them that it was void. Neither do they aver that the court in which they brought an action upon it decided that it was void; but they say that they dismissed their action against Williams, upon "becoming convinced from the rulings of the honorable court that judgment could not be recovered by them."

If the assessment was a valid one, the superintendent of streets cannot be required to make another, and unless facts showing that it was not valid were clearly set forth in their application, the court was justified in refusing to grant the writ.

1. The plaintiffs do not show very clearly in their application wherein the plans and specifications which were on file in the office of the city surveyor "required about eight feet of sewer more to be laid" than was authorized by the resolution of intention, but we under-

stand therefrom that they required the sewer to be laid to a point 988 feet west of the east line of Pearl Street, instead of 980 feet westerly therefrom, as specified in the resolution. If this be the fact, it would result that the plaintiffs laid the westerly eight feet of the sewer without authority, and that they are not entitled to an assessment for that portion of the work done by them. It does not result, however, that the assessment for the work done by them that had been authorized by the resolution of intention was void.

Neither does it clearly appear from the application where the lot of Williams was situated with reference to this excess of eight feet. If it was wholly or in part within the eight feet, the plaintiffs are not entitled to an assessment against that part of the lot not fronting upon the work authorized by the city council. If his lot was east of the 980-feet limit, the assessment against it would not be rendered void by the fact that the entire assessment purported also to make a charge upon lots that were not within the resolution of intention. Inasmuch as the price at which the plaintiffs were to do the work was estimated by the linear foot, the cost of that which was done by them outside of the 980-feet limit could be easily segregated from the remainder. (*Himmelmann* v. *Hoadley,* 44 Cal. 276.)

2. If the assessment embraced only the frontage upon the 980 feet covered by the resolution of intention, but included the expense of laying the sewer in the eight feet outside of that limit, it was an error which could have been corrected by the city council upon appeal, and the failure to take such appeal was conclusive upon the owner as well as upon the contractor. (*Himmelmann* v. *Hoadley,* 44 Cal. 276; *Boyle* v. *Hitchcock,* 66 Cal. 129.)

If the lot of Williams as assessed was partly within the 980 feet authorized by the resolution of intention to be "improved" by the sewer, and partly outside thereof, it was the duty of plaintiffs to appeal to the city council

within thirty days after the date of the warrant for the purpose of having the assessment corrected. Upon such appeal the city council would have limited the assessment to the 980 feet authorized by their resolution of intention.

Section 11 of the act of March 8, 1885 (Stats. 1885, p. 156), provides that "the *contractor* . . . . having or making any objection to the correctness or legality of the assessment . . . . shall, within thirty days after the date of the warrant, appeal to the city council. . . . . Upon such appeal, the city council may . . . . set aside, alter, modify, or correct the assessment in such manner as to them shall seem just; . . . . and may instruct and direct the superintendent of streets to correct the assessment in any particular, or to make and issue a new assessment to conform to the decisions of the city council in relation thereto. All the decisions and determinations of said city council . . . . shall be final and *conclusive upon all persons entitled to appeal* under the provisions of this section, as to all errors, informalities, and irregularities which said city council might have remedied and avoided."

It was the duty of the plaintiffs, and not of Williams, to take this appeal. They were interested in having a legal and correct assessment. If the assessment was illegal, and created no lien upon his land, Williams was not a person who would feel "aggrieved," and was not required to appeal for the purpose of giving to the plaintiff a valid assessment. (*Smith* v. *Cofran,* 34 Cal. 310.)

It follows that, inasmuch as the plaintiffs did not appeal from the act of the superintendent of streets in making the original assessment, they are concluded thereby, and are not entitled to have it corrected in any other mode.

It is unnecessary to decide whether any part of the work to be done under the resolution of intention is "the improvement of an entire crossing," or whether it

was necessary to post notices of the passage of the resolution "in front of each quarter-block liable to be assessed."

The order appealed from is affirmed.

PATERSON, J., and GAROUTTE, J., concurred.

[No. 13869. Department One.—February 3, 1891.]

ALVAN D. BROCK, RESPONDENT, *v.* J. W. PEARSON ET AL., APPELLANTS.

STATUTE OF FRAUDS—AGENCY—ACCEPTANCE OF BENEFIT.—Where a party verbally authorizes another to acquire an outstanding contract of purchase of land without restricting him as to terms, and the latter acquires such contract by agreeing to pay the amount due on the same and giving to the holder a certain interest in the contract, and the principal accepts the benefit of the bargain, he is bound by the terms made.

ASSIGNMENT—DEED TO LAND TO WHICH GRANTOR HAS NO TITLE, BUT ONLY EXECUTORY CONTRACT OF PURCHASE.—A deed to a portion of land for which the grantor holds only an executory contract of purchase operates as an assignment of a proportionate interest in the contract.

EXTINCTION OF OBLIGATION—DESTRUCTION OF DOCUMENT—INTENT.—The destruction of a document which operates as an assignment of a portion of a contract of purchase of land does not extinguish the assignee's right, unless the destruction was with the intention to extinguish such right.

ID.—EVIDENCE OF INTENT.—Upon the question of the intent with which a document was destroyed, the acts of the agent who induced the other party to consent to such destruction are material, and a substantial contract given by him is pertinent although he had no authority to sign it.

CONFLICT OF EVIDENCE.—The rule as to conflict of evidence applies to cases of contradictions in the testimony of a witness. The conflict is all the more fatal for being intestine.

LIS PENDENS—AMENDMENT OF COMPLAINT.—The effect of a notice of *lis pendens* is not ordinarily destroyed by an amendment to the complaint.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order refusing a new trial.

The facts are stated in the opinion.

King & Saufley, Houghton, Silent & Campbell, and *John D. Bicknell,* for Appellants.

Stephens, Apel & Stephens, E. L. Campbell, and *Brousseau & Hatch,* for Respondent.

HAYNE, C.—This was a suit to compel the conveyance of an undivided one-fourth interest in a tract of 704 acres of land in the county of Los Angeles. The trial court decreed the conveyance of a one-eighth interest, and the defendants appealed.

The general features of the case are as follows: On the 9th of June, 1887, the owner of the land, one A. W. Timms, gave the plaintiff a contract of sale thereof for the sum of twenty-five thousand dollars. The defendant Pearson was desirous of acquiring the property, and instructed one H. V. Burner to negotiate for its purchase. The latter effected an arrangement with plaintiff whereby he was to give up his bargain upon certain terms which are considered below. The contract of sale, however, was not transferred directly to Pearson or to Burner. By Burner's direction it was transferred to one Weller, who acted in obedience to his instuctions. As soon as Weller received the contract of sale, he (by direction of Burner) gave the plaintiff a quitclaim deed purporting to convey a one-fourth interest in the land. On being informed of this, Pearson (who seems at that time at least to have supposed that the deed conveyed some title to plaintiff) insisted that it should be destroyed. And under instructions to this general effect, Burner induced plaintiff to destroy the deed under an arrangement which will be considered below. A few days after this (viz., on July 9, 1887), Weller transferred the contract of sale to Burner, who on the same day made the first payment to the owner, received a deed from him, executed a mortgage back, and then conveyed the property to Pearson. On the 20th of the same month the plaintiff commenced the present suit, and recorded a notice of *lis pendens.*

Subsequently, Pearson transferred certain interests in the property to third persons, and on October 20th of the same year, joined with them in a conveyance of the property to the San Pedro Harbor, Dock, and Land Improvement Company. On April 23d of the following year, this corporation conveyed ninety-two acres of the property to the defendant the Southern Pacific Railroad Extension Company. The plaintiff subsequently parted with one half of his one-fourth interest.

The main questions discussed are the following, viz.: What was the agreement which Burner made with the plaintiff for the transfer of the contract of purchase, and what was its effect? What was the effect of the destruction of the "deed" from Weller to Burner? and, What was the authority of Burner in the premises?

1. The court finds, in substance, that the agreement made by Burner with the plaintiff was, that if the latter would give up his contract with the owner of the property, Pearson would purchase the property in accordance with such contract, "and would then and there, in consideration of the transfer of such agreement, convey to plaintiff an undivided one-fourth interest in and to said premises free from all liens and encumbrances."

This agreement was not in writing, but there is not the slightest doubt that it was made. Burner so swears. Plaintiff so swears. Weller so swears. And there is no evidence to the contrary.

The court further finds that in pursuance of this agreement, the plaintiff transferred the contract of purchase to Weller, who immediately gave to plaintiff a deed purporting to convey an undivided one-fourth interest in the land. And the evidence in support of this finding is uncontradicted.

Now, inasmuch as Weller had no title to the land, he could convey none to the plaintiff. But the parties seem to have regarded the "deed" as sufficient to protect the plaintiff's rights. And we think that it operated as an

assignment of a one-fourth interest in the contract of sale. (*Heinlen* v. *Martin,* 53 Cal. 321; *Hilton* v. *Young,* 73 Cal. 196.) It is possible that as against the owner of the property, the contract could not be split up in this manner. But no such question can arise between the parties here. It results that after this arrangement the plaintiff had a one-fourth interest in the contract.

2. What was the effect of the destruction of the deed above mentioned?

The defendants contend that such destruction was in pursuance of an arrangement made for the purpose of placing the title to the whole property in Pearson, so that he could "handle" it, and that the intention was to extinguish the obligation held by plaintiff, as provided in section 1699 of the Civil Code, and to substitute an arrangement by which the plaintiff was not to have any right to the land, but was only to be interested in the profits to arise from the "handling" of Pearson. The findings, however, distinctly negative any such idea.

The court finds that the deed was destroyed under an agreement that when plaintiff should obtain the legal title he "would immediately better and fully secure plaintiff to an undivided one-fourth interest in and to the same"; that the arrangement was not that plaintiff should be interested only in profits to arise from the acts of Pearson, but that the original agreement "was never modified or changed."

These findings are sustained by the testimony of Burner, by the testimony of Weller, and by the testimony of one Barber. And what is more to the purpose, it was proven that a writing was in fact executed by Weller (who still held the contract of sale), whereby a one-fourth interest in such contract was assigned to one Stratton, who was the agent and attorney for plaintiff. In this regard Stratton testified that he was the attorney for plaintiff, and that the arrangement was, that "in lieu of that deed an assignment should be taken by me to

hold for Brock, as trustee, temporarily, until the purchase should be finally consummated and Pearson should execute proper documents to secure Mr. Brock in his interest."

As against this overwhelming evidence, the defendants rely upon the testimony of the plaintiff himself, and insist that he should be bound by it. It is undeniable that the plaintiff (who does not seem to be a very clear-headed man) testified, in a suit by a third party against Pearson, that he was to be interested in the profits of a corporation to be formed, and not in the property itself; and he testified to something like that in the present suit. But he also gave testimony going to show that the corporation was to be a thing of the future, and was not to operate as a present extinguishment of his interest. Thus he says: "I did not understand that he was to sell the property, because I claimed one fourth in it, and should be consulted, but simply to enable him to carry out a certain scheme of a corporation that was *eventually* to take this property." And the other witnesses testify that while there was some talk about a corporation, nothing definite was concluded in relation to it.

We cannot agree to the proposition that the plaintiff is bound by such of his testimony as was favorable to the defendants. At the very most, it only amounted to a conflict in the evidence; and it has been said that a conflict is "all the more fatal for being intestine." (*Crook* v. *Forsyth,* 30 Cal. 662; *Bernal* v. *Wade,* 46 Cal. 666.) But we go further than this. We think it clear, upon the evidence, that the right of the plaintiff to an interest in the land was not intended to be extinguished, and that the talk about profits related merely to future action, which was that the property should be put in the hands of Pearson, so that he could "handle" it for the benefit of those interested in it. Such an arrangement could be no stronger than a power of attorney to Pear-

son. This could be revoked at any time, and whatever arrangement was made was undoubtedly revoked by the commencement of the present suit and the recording of the notice of *lis pendens*.

One of the learned counsel for the appellants urges in this regard that the plaintiff "cannot place the title unencumbered in Pearson for the purpose of a trade, obtain the money of the corporations, and then be heard to claim that the property was encumbered by some secret trust in favor of himself." And the others say: "Brock permits Pearson to have a clear title for the very purpose of conveying the property to a corporation clear of all encumbrances, and then when Pearson has so conveyed to such corporation, Brock jumps up to ask that the corporation deed back a part of the property to him," with more in the same strain.

The counsel overlook the fact that the present suit was commenced, and the notice of *lis pendens* recorded, on July 20, 1887, and that the conveyance to the first corporation was not until October 20, 1887, and to the second, not until April 23, 1888. Furthermore, there is not a syllable of evidence in the record to the effect that Pearson ever paid or offered to pay any portion of the profits to the plaintiff. On the contrary, he denied that plaintiff had any right to the land, and after the suit was commenced said that he should never get a cent.

3. What was the authority of Burner in the premises?

The court finds that Burner "at all times was the duly authorized agent of the defendant Pearson, with general power to purchase said property."

There is evidence in support of this finding. Burner testifies that he "received verbal instructions from the defendant John W. Pearson to purchase the property"; that such instructions "were simply verbal, to get hold of the property as best I could,—that is, to make the best terms I could to get hold of the property"; and

that he was not simply to ascertain what the property could be bought for, but to "get hold" of it.

We do not see any evidence contradicting these statements. The argument for the appellants is founded on what occurred subsequently. In this regard Burner testifies that after the arrangement was made by which the plaintiff transferred his contract to Weller, and the latter gave back a deed to plaintiff, he (Burner) went to San Francisco and told Pearson what had been done, whereupon the latter said that "the transaction was satisfactory, except that he did not want that deed out. He said he wanted that deed destroyed. He said he would assign the various interests himself." Pearson's account is somewhat different from this. But he wrote a letter to Burner, in which he said: "There must be no lien or obligation on the seven hundred acres except the fifteen thousand dollars. *I will give the contract to carry the various interests* to you and your friend, *and for the man from whom you get the bond;* so sign nothing to any one," etc. This letter was shown to the plaintiff, and Burner testifies that "the transaction would never have went through if I hadn't got the letter then that he would agree to carry those interests satisfactorily to all parties."

Upon this evidence the only argument that can be made with any semblance of merit is, that Burner had no authority to *sign* anything; that the culminating act was to be done by Pearson himself; and that the plaintiff knew this, because the letter was shown to him.

But the answer is, that there was no need for him to sign anything. As shown under the first head of this opinion, the giving of the deed from Weller to the plaintiff operated as an assignment of a one fourth interest in the contract. The giving up by plaintiff of his bargain was sufficient consideration for this assignment. And Burner had ample authority to make the arrangement, because, as above shown, he was sent with general in

structions to "make the best terms I could to get hold of the property." This shows a right in the plaintiff. It devolved upon the defendants to show that such right was destroyed. And in order to do this they are driven to rely, and do rely, upon the destruction of the deed with the consent of the plaintiff. But in order to sustain this, it was necessary to show that the deed was destroyed "with intent to *extinguish* the obligation thereof." And we think we have shown conclusively, under the second head of this opinion, that there was no intent to "extinguish" the right of plaintiff to a one-fourth interest in the land. It was evidently destroyed under a belief that it conveyed title to the land, and the object was to have the title in the name of Pearson. But the oral evidence clearly shows that there was no intent to extinguish plaintiff's right to a conveyance, which was the only obligation the "deed" could have; and this is further manifest from the fact that a writing evidencing such right was actually given. The intent with which the deed was destroyed is the material thing; and in relation to this, it is of no consequence whether Burner or Weller had authority to sign anything or not.

4. The defendants, other than Pearson, had notice of the plaintiff's rights when they purchased the property. This is found by the court; and it seems plain that the notice of *lis pendens* was sufficient to charge them with notice. (*Randall* v. *Duff*, 79 Cal. 116.) The amendment to the complaint did not destroy the effect of the notice of *lis pendens*.

The other matters do not require special mention.

We therefore advise that the judgment and order denying a new trial be affirmed.

FOOTE, C., and BELCHER, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

[No. 13954. Department One.—February 3, 1891.]

RUSS LUMBER AND MILL COMPANY, Respondent, *v.* G. A. GARRETTSON et al. G. A. GARRETTSON, Appellant.

Mechanic's Lien—Foreclosure—Pleading—Demurrer—Appeal—Objection for First Time.—An objection to the complaint in an action to foreclose a lien for materials furnished a contractor, on the ground that it states merely a conclusion of law as to the amount due and owing from the owner to the contractors, and that it contains no specific averment as to what was the contract price between them or that there was any express agreement to pay anything, or what was the reasonable value of the work to be done, can only be raised by demurrer, and cannot be urged for the first time on appeal.

Id.—Notice of Claim to Owner—Duty of Owner.—Under sections 1183 and 1184 of the Code of Civil Procedure, whether a building contract is recorded or not, if proper notice is given to the owner, by a material-man, of the material furnished to the contractor, it is the duty of the owner to withhold from the contractor sufficient money to pay the claim, if it is then due or afterwards becomes due.

Id.—Contents of Notice—Pleading.—A complaint alleging that materials were furnished by the plaintiff for the construction of a building at the request of contractors named, and stating in general terms the kind and total price of the materials, and that the plaintiff gave the owner a written notice that it had agreed to furnish the materials "as aforesaid," sufficiently shows the contents of the notice to meet the requirements of section 1184 of the Code of Civil Procedure.

Id.—Copy of Claim of Lien—Pleadings.—The contents of the claim of lien may be pleading by attaching a copy thereof to the complaint, and making it a part thereof by apt reference.

Id.—Claim of Lien—Substantial Compliance with Statute.—A claim of lien is sufficient if it substantially complies with the statute.

Id.—Name of Owner of Building.—A claim of lien stating that a person named was the owner of a lot of land described, and that he entered into a contract with persons named to erect and finish a building on the lot, which was completed at a time named, sufficiently states that the owner of the lot was the owner of the building, and designates the name of the owner of the building.

Id.—Terms of Contract.—A statement in the claim of lien that the claimant furnished the materials under a contract with the contractors named, by which they agreed to pay the market value thereof at the date of delivery in cash, and showing the whole value of the materials furnished and balance unpaid, sufficiently shows the names of the persons to whom the materials were furnished and the terms of the contract.

Id.—Claim of Charge upon Property.—A statement in the claim of lien that the claimant "claimed the benefit of the pro-

vision of the Code of Civil Procedure relating to lien of mechanics on real property" sufficiently purports to charge the property described in the claim.

ID.—GENERAL FINDING—VALIDITY OF LIEN—SUPPORT OF JUDGMENT.—A general finding to the effect that the plaintiff's claim of lien duly verified was filed for record in the office of the recorder of the county where the premises are situated, pursuant to the Code of Civil Procedure, and that said claim of lien is in due form, and was filed in due time, and is a valid subsisting claim of lien under the law, is sufficient to support a judgment foreclosing the lien.

ID.—LIEN FOR MATERIALS—JUDGMENT AGAINST CONTRACTORS—FORECLOSURE.—A judgment against the contractors to whom the materials were furnished is not necessary to support the lien of the material-man; and the fact that the contractors are parties defendant, and no judgment is taken against them, is not ground for reversing a judgment foreclosing the lien against the owner of the building.

APPEAL from a judgment of the Superior Court of San Diego County.

The facts are stated in the opinion.

L. L. Boone, for Appellant.

Reinoehl & Harrison, for Respondent.

BELCHER, C.—The plaintiff, a corporation, brought this action to foreclose a lien for materials furnished for and used in the erection of a building on land owned by defendant Garrettson.

It is alleged in the complaint that on the seventeenth day of February, 1888, defendant Garrettson entered into a contract with defendants Wanberg & Nelson, whereby they agreed to erect and finish for him a building on a certain described piece of land; that on various occasions between the twenty-second day of February and the twentieth day of May, 1888, the plaintiff, at the instance and request of the contractors, furnished materials, viz., lumber, laths, shingles, and windows, to be used and which were actually used in the erection and construction of the building specified in the contract; that the market value of the materials so furnished, and the amount agreed to be paid therefor, is the sum of $1,112.56,

of which sum $300 has been paid, and the balance of $812.56 is still due, owing, and unpaid to the claimant; that on the twenty-third day of February, 1888, the plaintiff duly gave to Garrettson a written notice that it had agreed to furnish the materials as aforesaid for the erection of said building, and thereafter there became and was due and owing from him to the contractors, on account of the contract, an amount largely in excess of the balance so due and unpaid to plaintiff, and sufficient to answer its claim, including costs and attorney's fees; that Garrettson is now, and during all the time herein specified was, the owner of the lot of land on which the building was erected, and all thereof is necessary for the convenient use and occupation of the building; that on or about the twentieth day of June, 1888, the building was completed, and thereafter, on the thirteenth day of July following, plaintiff, for the purpose of securing and perfecting a lien for the moneys so due upon the building and land described, under the provisions of chapter 2, title 4, part 3, of the Code of Civil Procedure, filed for record in the recorder's office of the county in which the property was situated, its claim of lien, which was duly verified, and three days later duly recorded, and a copy of which, marked "Exhibit A," was attached to and made a part of the complaint.

Defendant Garrettson demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, "for the reason that the instrument set forth in said complaint as exhibit A, and purporting to be a notice of claim filed for record in the recorder's office, does not comply with the statute in such cases made and provided, inasmuch as there are no words or clauses contained therein which set out a claim of lien on certain property to be charged therewith, and the statement of demand is entirely wanting," and also on the ground that the complaint was ambiguous, uncertain, and unintelligible, "for the reason that it appears

upon the complaint that the contract therein was for an amount exceeding one thousand dollars, from the sum of money therein set forth, and from the fact that Wanberg & Nelson are made parties defendants; but it does not state whether there was a written contract filed in accordance with law, or set out said contract in the complaint as the best evidence." The demurrer was overruled, and he then answered.

The case was tried, and judgment rendered foreclosing the lien, as prayed for. From that judgment Garrettson alone appeals, without any statement or bill of exceptions.

It is argued for appellant that the complaint was insufficient, because there was no averment as to what was the contract price between the owner and contractors, or that there was any express agreement to pay anything, or as to what was the reasonable value of the work to be done; and hence, it is said, there was nothing to show that any sum ever became due under the contract from the owner to the contractors.

It is true that neither the contract price nor the reasonable value of the work was specifically set forth in the complaint; and the averment that after the plaintiff gave Garrettson written notice that it had agreed to furnish the materials, there became and was due and owing from him to the contractors, on account of the contract, an amount in excess of the balance due and unpaid to the plaintiff, was a statement of conclusions of law rather than of facts. And of course this statement, if tested by demurrer, would have been insufficient. It was, however, not so tested, nor was it in any way traversed by the answer. The point seems to be made here for the first time. Under such circumstances, we think the complaint should be held sufficient in this regard.

In this connection it is suggested that if Garrettson agreed to pay a price for the erection of his building, and the amount exceeded one thousand dollars, the contract was void, unless properly recorded; and if the

amount was less than one thousand dollars, he was not required to reserve twenty-five per centum thereof for thirty-five days after the building was completed, but could pay the price at any time and in any way agreed on by the parties. And it is said, for aught that appears in the complaint, the price may have been fully paid before the work commenced, or may have been a prior indebtedness. But the statute, after providing that if the contract price exceeds one thousand dollars, the contract, or a memorandum thereof, must be recorded or otherwise be wholly void, goes on to say, "and in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." (Code Civ. Proc., sec. 1183.) And the next section (Code Civ. Proc., sec. 1184) has this provision: "Any of the persons mentioned in section 1183, except the contractor, may, at any time, give to the reputed owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount and value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. . . . . Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may become due, to such contractor, or other person, to answer such claim and any lien that may be filed therefor for record under this chapter, including counsel fees

not exceeding one hundred dollars in each case, besides reasonable costs, provided for in this chapter."

Under these provisions, whether the contract was recorded or not, if proper notice was given, and if sufficient money was then due, or afterwards became due, from the owner to the contractors, to pay the plaintiff's claim,—and that sufficient did become due is not denied or questioned,—it was the duty of the owner to withhold the same from the contractors, and the plaintiff is now entitled to have his claim of lien therefor enforced.

But it is urged that it does not appear what were the contents of the notice given by the plaintiff to the owner, and that it should therefor be held insufficient to meet the requirements of section 1184 of the code. The complaint alleges that the plaintiff furnished the materials to be used in the construction of the building, stating in general terms the kind of materials, at the instance and request of the contractors, naming them, and that the amount agreed to be paid for all thereof was $1,112.56. It is then alleged that the plaintiff gave to the owner of the property a written notice that it had agreed to furnish the materials *as aforesaid,* etc. The words "as aforesaid" evidently referred to the materials and the persons to whom they were furnished and the value thereof as before stated, and hence we think the notice must be held sufficient.

It is also objected that the complaint must allege that a claim of lien has been verified and filed, containing certain statements, and that the complaint is insufficient in this respect. It was alleged that a claim of lien was verified and filed, and a copy thereof was attached to and made a part of the complaint, and whether it contained the required statements or not was shown by the lien itself.

It is further objected that the claim of lien is defective in that it does not purport to charge the property, nor state the name of the owner of the building, nor state to

whom the materials were furnished, nor the terms of the contract.

A substantial compliance with the statute is all that is required. (*Tredinnick* v. *Mining Co.,* 72 Cal. 78.)

The claim of lien states that Garrettson was the owner of a lot of land, which is described, and that he entered into a contract with Wanberg & Nelson by which they agreed to erect and finish for him a building on the lot, and that the building was completed at a time named; that the plaintiff furnished the materials under a contract with Wanberg & Nelson, by which they agreed to pay the market value thereof at date of delivery, in cash, and the whole value and balance unpaid are stated; and that the plaintiff, on a day named, duly gave a written notice to Garrettson that he had agreed to furnish the materials as aforesaid, wherefore it claimed the benefit of the provisions of the Code of Civil Procedure relating to liens of mechanics on real property.

The above seems to be a sufficient statement that Garrettson was the owner of the building which was erected for him on his land, and that the materials were furnished to Wanberg & Nelson, his contractors. To say that the name of the owner of the building, and the names of the persons to whom the materials were furnished, are matters of mere inference, since it does not *necessarily* follow that the owner of the land is the owner of the building, and the material *might* have been furnished to a subcontractor or other persons, seems to us to be not even a plausible argument. So the terms of the contract, we think, were sufficiently stated. (See *Hills* v. *Ohlig,* 63 Cal. 104, and *Jewell* v. *McKay,* 82 Cal. 144.) And the demand that the plaintiff have the benefit of the law relating to liens was a sufficient statement that it claimed a lien on the described lot of land with the building thereon.

It is objected that there is a variance between the contract set out in the complaint and that set out in the

claim of lien. We see no material variance. The contract, as set out in both papers, seems to be substantially the same.

It is also objected that the findings of the court are insufficient to support the judgment. This is rested upon the tenth finding, which reads as follows: "That on the thirteenth day of July, 1888, plaintiff, for the purpose of securing and perfecting a lien for the money so due it, as aforesaid, upon the land and premises and building aforesaid, hereinafter described, pursuant to the provisions of chapter 2, title 4, part 3, of the Code of Civil Procedure of the state of California, filed for record in the office of the recorder of San Diego County, California, where said premises are situated, its claim therefor duly verified in its behalf by its manager, S. S. Johnson, and that said claim of lien is in due form and was filed in due time, and is a valid subsisting claim of lien under the law."

We think the finding sufficient.

Lastly, it is said that there is no judgment against the parties personally liable, and that such judgment is necessary to support the lien. We know of no law or decision supporting this position. The case of *Phelps* v. *M. C. G. M. Co.*, 49 Cal. 336, cited in support of it, only holds that the material-man, in an action to enforce a lien, was not entitled to a personal judgment against the owner.

We find no material error in the record, and advise that the judgment be affirmed.

HAYNE, C., and FOOTE, C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed, and the court below is directed, upon the filing of the *remittitur* therein, to allow the plaintiff, as a part of the costs upon this appeal, a reasonable fee for the services of its attorneys in this court.

Hearing in Bank denied.

[No. 13657. Department Two.—February 3, 1891.]

WILLIAM FINCH, APPELLANT, v. THE RIVERSIDE AND ARLINGTON RAILWAY COMPANY, RESPONDENT.

EMINENT DOMAIN—COMPENSATION—USE OF STREETS—DEDICATION—STREET-RAILWAY.—The dedication of a street to public use authorizes any ordinary use for street purposes; and the use of a street for the tracks of a street-car company is of this class, and may be authorized by the city authorities, without compensation to the owner of the fee of the street.

STREET-CAR COMPANY—POSITION OF TRACK — FRANCHISE — EJECTMENT.—The tracks of a street-car company should be laid as nearly as practicable in the middle of the street. If the franchise does not indicate the precise position of the track, and it is not as nearly as practicable to the middle of the street, the track is an unauthorized obstruction, and the owner of the fee of the street may maintain ejectment against the company.

ID.—PUBLIC CONVENIENCE.—The mere fact that it is more convenient to the traveling public to have the track on the side of the street, and that it obstructs travel a little less than it would do in the center of the street, is not a sufficient reason for not complying with the law.

TRUSTEE—MUNICIPAL CORPORATION—INTEREST—FRANCHISE.—When an application for a franchise was referred to a committee of two, and upon their favorable report the franchise was granted, the fact that one of the committee was a subscriber to the stock of the company for whose benefit the franchise was granted renders the franchise void.

ID.—CORPORATION.—It makes no difference that the corporation for whose benefit the franchise was granted was not yet formed; it is sufficient that the franchise was granted to a committee of subscribers for the benefit of the corporation.

PRESUMPTION—IDENTITY.—Identity of persons is presumed from identity of name. Instance.

APPEAL from an order of the Superior Court of San Bernardino County refusing a new trial.

The facts are stated in the opinion.

H. C. Rolfe, for Appellant.

The fact that one of the city trustees was interested in the corporation defendant invalidated the grant of the franchise. (*San Diego* v. *San Diego etc. R. R. Co.,* 44 Cal. 106; *Pickett* v. *School District,* 25 Wis. 552; 3 Am.

Rep. 105; *Cumberland Coal Co.* v. *Sherman,* 30 Barb. 553; *Aberdeen R'y Co.* v. *Blakie,* 1 Macq. 461; *Rubidoex* v. *Parks,* 48 Cal. 215.)

W. J. McIntyre, for Respondent.

HAYNE, C.—This was an action of ejectment brought by the owner of the fee of one half of a street in the city of Riverside, called Cypress Avenue, against a street-car company, which was alleged to be using such half of the street in an unauthorized and unlawful manner. The trial court gave judgment for the defendant, and the plaintiff appeals.

There is no dispute about the plaintiff's ownership of the fee of half of the street, nor about the existence of the street, and the consequent right of the public to use it as a highway. The question litigated is, whether the defendant's use of it was unauthorized and unlawful. In this regard several points are made.

1. It is contended that the defendant could not use the street for the purposes of its track without first making compensation to the plaintiff, and the case of *Weyl* v. *Sonoma Valley R. R. Co.,* 69 Cal. 203, is cited. But this case was not in relation to a street-railway, but to an ordinary railroad whose route took it through a street. And we think that there is a difference between such a case and the present. The dedication of a street to public use authorizes any ordinary use for street purposes; and the use of a street in a city or town for the tracks of a street-car company is of this class, and is therefore authorized.

2. It is argued that the track was not located as required by law. The provision of the statute in relation to the subject is, that "the city or town authorities, in granting the right of way to street-railroad corporaions, in addition to the restrictions which they are authorized to impose, must require a *strict* compliance with the following conditions: . . . . 1. To construct their track on

those portions of the street designated in the ordinance granting the right, which must be *as nearly as possible* in the middle of the street." (Civ. Code, sec. 498.)

The order granting the franchise did not prescribe the precise part of the street upon which the track was to be located. It was merely that the franchise be granted to the applicants "according to their application"; and while the application named the streets through which the road was to run, it did not refer to any particular portion of any street. There was, however, a general ordinance applicable to all street-car companies, providing that "the track shall be laid as near the center of the street or streets along the route of the railways *as practicable.*"

It will be observed that the effect of this was, that the board did not exercise its own judgment as to the portion of the street to be occupied by the track, but left it to the company to construct their track as near the middle of the street as "practicable."

The company evidently did not consider it practicable to place the track in the middle of the street, and accordingly placed it on the side next the plaintiff's lot. The precise location is not shown by the record; but the court finds that *"it was not practicable* to locate the track in the middle of Cypress Avenue." The court further finds that the franchise provided that the track was to be laid "along the eastern side of Cypress Avenue" (which, as above shown, it did not provide); and that "the location of the defendants' track was in conformity with the requirements of said franchise."

The plaintiff's position is, in the first place, that the words "as nearly as possible" do not mean "as nearly as practicable," as held by the trial court; and that even if they do, the finding that it was not practicable to locate the track in the middle of the street is not sustained by the evidence.

In relation to the first question, we think that the

statute means "as nearly as practicable." As a matter of course, it is always physically possible to place a track in the middle of a street. It may not be legally possible. For example, there may already be a track there under a franchise which it is beyond the power of the board to revoke. But even if a track were placed in the middle of the street under a revocable license, we think that the board would have power to authorize the laying of another track so as not to interfere with the first. So if, as is sometimes the case in rural towns, a row of trees were in the middle of the street, the track could be placed on one side. And we are not prepared to say that the conditions of traffic might not be such as to require a similar location. The use of the words "as nearly" in connection with "as possible" shows that it was foreseen that a location in the middle of the street could not always be made; and we think that from the nature of the case, the meaning must be that the location must be controlled in some degree by the circumstances of the particular case.

But we do not think that the evidence in the case before us shows any reason why the track could not be located in the middle of the street. Only two witnesses testified on the subject. One of them said, in substance, that it was "impractical" to place such a track in the middle of such a narrow street (it was forty feet wide), because it would interfere with traffic. To use his own language: "It is impractical to put it in the center of such a narrow street, because it interferes *a little bit* with the travel, just about the same as when Mr. Finch goes across to his lot 210. It interferes with the travel in passing teams. If the travel is very great, it interferes materially. It depends on how much travel there is." But the witness did not state how much travel there was.

The other witness said that a track in the middle of a street would interfere with traffic "very extensively." But he went on to say: "Putting a street-railway in

such a street would interfere with the use of the street for other travel, *wherever you put it.* But I should deem it *advisable* not to put any street-railway in the center of such a narrow street, for the reason that it will obstruct the travel to such extent that teams, for instance, cannot pass each other on either side of the track without crossing the track. There would be room on each side for teams to pass. . . . . *Of course it is practicable.*"

The effect of this testimony is merely that in the opinion of the witnesses the requirement of the law is wrong; and that it is more convenient to the traveling public to have the track on the side of the street. But the law certainly means more than this. It is an injustice to the property owners on one side of the street to have the obstruction placed close to their doors. And for this, among other reasons, the law requires that it must be placed as near the middle of the street as practicable, and enjoins a "*strict* compliance" with the requirement.

3. It is contended that the franchise is void because a subscriber to the stock of the company was a member of the board of city trustees, and took an active part in the proceedings in relation to the franchise; and we think that this position must be sustained.

It appears that when the application for the franchise was made, a number of protests were put in, and the matter was referred to a committee of two, of which E. W. Holmes was one. This committee made a report in writing, recommending that the application be granted.

The report was adopted, and the franchise granted at the next meeting. Several months prior to this, an agreement to subscribe to the capital stock of a street-car company, to be formed on lines similar to those of the defendant, was gotten up, and by it E. W. Holmes subscribed for two hundred shares of stock. A committee of subscribers was appointed to apply for a franchise. The *personnel* of this committee was subsequently changed to some extent. The application was made by

the committee, and was granted, on the favorable report of the committee of two, of which Holmes was a member, as above stated. Subsequently the committee made a deed of the franchise to the company.

It is true that there was no testimony to show that E. W. Holmes, the city trustee, was the same person as E. W. Holmes, the subscriber. But in the absence of evidence to the contrary, identity of person will be presumed from identity of name. It is also true that no corporation was formed at the time of the subscription, and that the franchise was granted to several individuals, and not to a company. But, as above shown, the individuals constituted a committee of the subscribers appointed for the purpose of applying for the franchise, and after they obtained it, they transferred it to the company formed in pursuance of the subscription.

We think that it sufficiently appears that the franchise was granted for the benefit of a corporation to be organized by a number of subscribers, of whom the city trustee was one, and was subsequently transferred to the corporation; and taking this to be the fact, the case falls within the principle of *San Diego* v. *San Diego etc. R. R. Co.*, 44 Cal. 106. The trustee was one of a committee of two to whom the application was referred, and the favorable report of this committee, which was adopted by the board, must have influenced its action. In our opinion, this vitiated the franchise.

For the above reasons, we think that the defendant was a mere intruder upon the street, and under the case of *Weyl* v. *Sonoma Valley R. R. Co.*, 69 Cal. 203, the plaintiff can maintain ejectment against it.

We therefore advise that the order appealed from be reversed, and the cause remanded for a new trial.

VANCLIEF, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the order appealed from is reversed, and the cause remanded for a new trial.

[No. 13920. Department Two.—February 3, 1891.]

JESSE YARNELL, APPELLANT, *v.* CITY OF LOS ANGELES ET AL., RESPONDENTS.

CONSTITUTIONAL LAW—MUNICIPAL CHARTER—DEPOSITARY OF PUBLIC MONEYS—BANKS.—The provisions of section 44 of the charter of Los Angeles (approved January 31, 1889), which direct the city council to appoint as depositary of the public moneys the bank offering the highest rate of interest thereon, and further providing that the council shall direct the city treasurer to deposit with the bank daily all public moneys of the city by him collected or received, is unconstitutional and void.

ID.—DELEGATION OF POWER TO CONTROL MUNICIPAL FUNDS.—Section 13 of article 11 of the constitution, forbidding the legislature to delegate to any special commission, private corporation, company, association, or individual any power to control or in any way interfere with any county, city, town, or municipal money, forbids the delegation of power to a municipal corporation to do what the legislature is forbidden to do, there being no such power of delegation expressly conferred by the constitution.

ID.—CONSTRUCTION OF CONSTITUTION—LEGAL DEPOSITARY—LOAN OF PUBLIC MONEY.—Section 16 of article 11 of the constitution, requiring that all moneys of any municipal corporation coming into the hands of any officer thereof shall immediately be deposited with the treasurer, "or other legal depositary," etc., is intended to designate only the public officer who is the legal custodian of the municipal funds, and does not include a private individual or corporation in the phrase "legal depositary," or authorize the relation of debtor and creditor to be established between the city and a bank by a loan to it of the public money.

ID.—MAKING PROFIT FROM PUBLIC MONEY—BANK AS PUBLIC OFFICER.—A contract by a municipal corporation making the bank which will pay the highest rate of interest a depositary of the public moneys of the city, if it could be held to make the bank a public officer under the municipal charter, is in violation of section 17 of article 11 of the constitution, which makes it a felony for any officer having the possession or control of public money to make a profit therefrom.

ID.—CONFLICT WITH GENERAL LAWS—PENAL CODE—CORPORATIONS.—Section 44 of the Los Angeles charter is in conflict with sections 424 and 426 of the Penal Code, establishing penalties for certain acts committed by any person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys belonging to a city, which penalties could not be visited upon a private corporation, in whose possession and control the moneys of the city are placed.

ID.—SUIT BY TAX-PAYER—INJUNCTION.—A tax-payer of a city has sufficient interest in the subject-matter to sue to enjoin the consummation of an illegal contract by the city with a bank, by which it is proposed to take the public moneys out of the hands of the legal custodian of them and deposit them in the bank as a loan at interest.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

Chapman & Hendrick, for Appellant.

The legislature cannot authorize public money to be loaned in aid of a private enterprise. (Cooley on Taxation, 69, 79, 89, 90; *Allen* v. *Inhabitants of Jay,* 12 Am. Law Reg., N. S., 481.) A bank cannot be made a public officer by special contract, without an election or appointment pursuant to a general law. (Const., art. 11, sec. 5.) The charter violates sections 9, 13, 16, and 17 of article 11 of the constitution, and also subdivisions 2, 28, and 29 of sections 25, and sections 30 and 31 of article 4. The charter is void, because inconsistent with the general law. (*Matter of Maguire,* 57 Cal. 604; 40 Am. Rep. 125; *Weber* v. *Santa Clara County,* 59 Cal. 265; *Thomason* v. *Ashworth,* 73 Cal. 77–79.) All prohibitory provisions of the constitution are self-executing. (*McDonald* v. *Patterson,* 54 Cal. 245; *Matter of Maguire,* 57 Cal. 604, 40 Am. Rep. 125.)

C. McFarland, S. M. White, and *Graff, Gibbon & Creighton,* for Respondents.

The deposit of the money in the bank has no connection with the objects for which the tax was levied. The bank is only the depositary of the city funds, and is bound to pay out the money when required, as the treasurer would be compelled to do. The legislature has not attempted to delegate its power. It had nothing to do except to approve the charter, which is not a legislative act. The bank is a "legal depositary," under section 16 of article 11. It is only an unlawful deposit of public money in a bank which is forbidden by subdivision 4 of section 424 of the Penal Code. In this case the deposit was lawful by the terms of the municipal charter and

ordinance. An act should not be held unconstitutional in a doubtful case. (*Fletcher* v. *Peck,* 6 Cranch, 128.)

MCFARLAND, J.—This is an action brought by a resident, and tax-payer, against the city of Los Angeles, M. D. Johnson, treasurer of said city, and the City Bank, a private corporation. The purpose of the action is to enjoin the said treasurer from depositing the public moneys of the city with said bank pursuant to a certain contract between the city and the bank. Defendants filed a general demurrer "that said complaint does not state facts sufficient to constitute a cause of action." An answer and supplemental answer were filed, together with some affidavits, and the case was submitted. Subsequently, the court rendered judgment, by which it was "ordered, adjudged, and decreed that the demurrer to the complaint be sustained"; that plaintiff was not entitled to the injunction; that the order to show cause be discharged, and the action dismissed; and that defendants recover their costs. Plaintiff appeals from the judgment, and it is clear that the appeal turns upon the sufficiency of the complaint, and the correctness of the decision of the court upon the demurrer. Upon the face of the complaint appear the following facts:—

The city of Los Angeles is a municipal corporation existing under what is generally called a "freeholders' charter," formed in pursuance of the amendment of section 8 of article 11 of the state constitution, approved March 10, 1887. (Stats. of 1887, p. 88.) The charter was approved by the senate and assembly on January 31, 1889. Section 44 of the charter provides, among other things (in brief), that it shall be the duty of the city clerk, on a certain day of January in each year, to advertise for sealed proposals from banks of deposit as to the terms upon which they will "receive and disburse the public moneys of said city." The proposals are to specify the rate of interest, estimated upon daily bal-

ances, which the bank will allow on the public moneys deposited. And "the bank offering the highest rate of interest shall be appointed the depositary of public moneys." After it is ascertained who is the highest bidder, the council is to enter into a contract with the bank, providing that the latter shall pay "all warrants drawn upon the city treasurer" so long as there is city money in the bank to meet the warrants on the various funds. Provision is made for a bond to be given by the bank. "Upon approval of such bond, and the signing of such contract, the council shall direct the city treasurer to deposit each day, when such bank is open for transaction of business, with the bank thus selected, all public moneys of said city by him collected or received. For each such deposit the treasurer shall take the receipt of the bank, and from and after the deposit of such money in said bank the treasurer and his bondsmen shall no longer be liable therefor." Under this section of the charter the city made the kind of contract provided for therein with the defendant the City Bank; and the defendant Johnson, treasurer, was, under such contract, about to deposit the public money in said bank when this action was commenced. The question presented is, whether or not the provisions of said section 44 of the charter are constitutional and valid.

Section 6 of article 11 of the constitution provides that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted, by authority of this constitution, shall be subject to and controlled by general laws"; and the amendment to section 8 of article 11, under which the Los Angeles charter was framed, provides that certain cities may frame charters for their own government "consistent with and subject to the constitution and laws of this state." If, therefore, the provisions above stated of said section 44 of the charter in question are inconsistent either with the constitution or with any law which is "general," in the sense in

which it is used in the clause above quoted, then they are invalid and void. And we think that they are inconsistent with both.

There are several clauses of the constitution which point to the intent that public moneys shall not be used by or for the benefit of private persons and corporations; but one or two of them only need be invoked here. Section 13 of article 11 provides that "the legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or *in any way interfere with* any county, city, town, or municipal improvement, *money,* property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever." The only method proposed to avoid this provision is to say that while the legislature may not do the thing prohibited, it may authorize its creatures—municipal corporations—to do it. But the thing which the legislature is frobidden to do, it cannot delegate to another to do, unless such power of delegation is given by the constitution itself. And in other places there is such power of delegation given. For instance, in section 12 of article 11, the legislature is forbidden to impose taxes on municipalities for municipal purposes, *but* may, by general laws, vest such power in the municipal authorities; and in section 14 of the same article, the legislature is prohibited from creating any offices in municipalities for the inspection, etc., of merchandise, etc.; but it is provided that the municipality, "may, when authorized by general law, appoint such officers." In section 13, however, there is no such power of delegation given. Under the construction contended for by respondent, while the legislature is prohibited by section 26 of article 4 from authorizing lotteries, it could give that power to municipalities.

Again, carrying out the same intention, section 16 of article 11, which does not speak of the *legislature,* but

deals directly with municipalities themselves, provides that all moneys of any municipal corporations coming into the hands of any officer thereof shall immediately be deposited "with the treasurer, or other legal depositary, to the credit of such city, town, or other corporation, respectively, for the benefit of the funds to which they respectively belong." The word "treasurer" is the one by which the custodian of public money is usually designated, and he is a public officer; and the phrase "other legal depositary" is clearly used to designate such public officer, whether he be called in any particular municipality "treasurer," or by some other name. It is certainly does not mean a private individual or corporation. And in the case at bar, the relation between the city and the city bank, under the contract, is, we think, simply that of creditor and debtor,—the bank being a borrower of the public money.

But if the bank could be held to be a public officer, then the contract would be in the face of section 17 of article 11, which provides that "the making of profit out of county, city, town, or other public money, *or* using the same for any purpose not authorized by law, by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law." In this section the phrase "making of profit out of county, city, town, or other public money" is an independent clause, and, of itself, constitutes a felony, and is not dependent upon the subsequent words "not authorized by law," so that these latter words need not be here construed.

We think, also, that the section of the charter under review is inconsistent with both the spirit and the letter of the general laws of the state relating to public moneys. For instance, section 426 of the Penal Code defines "public moneys" as including all moneys belonging to "any city, county, town, or district"; and section 424 provides that "each officer of this state, or of

any county, city, town, or district of this state, and every other person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, who" commits certain acts with respect to such public moneys as are enumerated in ten subdivisions of the section, "is punishable by imprisonment in the state prison for not less than one nor more than ten years, and is disqualified from holding any office in this state. This is certainly a "general law" within any reasonable definition of that term that could be suggested, and the forty-fourth section of the charter is clearly inconsistent with it. Counsel contend that said section 424 (Penal Code) is qualified, in most part at least, by the words "without authority of law," which occur in the first subdivision. But waiving here the meaning of the word "law," as applied to a charter adopted by only a part of the law-making power, it is sufficient to say that section 224 enumerates a great many things which one having custody of public moneys may do which are not "authorized by law" in any sense, and which are declared to be crimes punishable by imprisonment in the state prison, and by debarment from office. But if a private corporation should commit any of these crimes, how could it be made to suffer the penalty prescribed? It has neither a body to be imprisoned, nor a right to hold office of which it could be deprived. It seems clear, therefore, that a scheme which places public moneys in the possession and control of a private corporation is entirely inconsistent with the provisions of the section of the code above quoted.

Without referring with further detail to other provisions of the constitution and the laws, our conclusion is, that the parts of section 44 of the charter of the city above referred to, and the said contract attempted to be made under it, are inconsistent with both the constitution and the general laws of the state; that the complaint in this action states facts sufficient to constitute a cause of

action; and that the court below erred in sustaining the demurrer.

The point is hinted at, though not pressed in the briefs, that a tax-payer cannot maintain this action. We suppose that counsel wish the case decided on its merits, and not upon an issue in the nature of one raised by a dilatory plea; for their arguments go almost entirely to the point of the constitutionality and validity of the part of the charter assailed. We think, however, that in this case, where it is proposed to take all the public moneys of the municipality out of the hands of their legal custodian, and place them in the possession and control of a private corporation, a tax-payer has sufficient interest in the subject-matter to prevent, by suit, the consummation of the illegal act.

The judgment is reversed, with direction to the superior court to overrule the demurrer to the complaint.

DE HAVEN, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

[No. 14066. In Bank.—February 3, 1891.]

STANLEY W. HOYT, RESPONDENT, *v.* SAN FRANCISCO AND NORTH PACIFIC RAILROAD COMPANY, APPELLANT.

APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT IN TIME—RULE OF SUPREME COURT.—Rule 3 of the supreme court, providing that if the transcript is on file when notice is given of a motion to dismiss the appeal for failure to file the transcript in time, that shall be a sufficient answer to the motion, will not preclude the dismissal of an appeal, where the notice of motion is given before the filing of the transcript, although the transcript is filed a few hours later on the same day.

IN.—PRIORITY IN TIME—FRACTIONS OF DAY.—Although in some cases courts will not take cognizance of fractions of a day to determine which of two acts was first in point of time, yet the rule is necessarily departed from when the question whether one legal right shall have priority over another depends upon the order of events occurring upon the same day.

MOTION to dismiss an appeal from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

E. S. Lippitt, and *Charles F. Hanlon,* for Appellant.

T. J. Crowley, for Respondent.

DE HAVEN, J.—The appeal in this case was dismissed by the court in Bank on December 11, 1890, and a rehearing thereafter granted. Upon full consideration we are satisfied with our former opinion, and for the reasons therein stated, the motion to dismiss the appeal must be granted.

It is true that for some purposes a day is regarded as an indivisible unit, and that in the cases where such rule properly applies, courts refuse to look into fractions of a day for the purpose of determining which of two acts was first in point of time; but when the question whether one legal right shall have priority over another depends upon the order of events occurring on the same day, this rule is necessarily departed from. (*National Bank* v. *Burkhardt,* 100 U. S. 689; *Louisville* v. *Savings Bank,* 104 U. S. 474.) And in *Main* v. *Gilman,* 11 Fed. Rep. 214, it is said: "It is insisted that the law knows no fractions of a day. But this ancient maxim is now chiefly known by its exceptions. When private rights depend upon it, the courts inquire into the hour at which an act was done, or a decree was entered, or an attachment was laid, or any title accrued."

In the case of *Hill* v. *Finnigan,* 54 Cal. 313, the material fact, as to whether the notice of motion to dismiss was given prior to the time of filing the transcript, was a matter of controversy, and what was there said about not looking into fractions of a day for the purposes of dismissing an appeal must be considered as having reference only to the then state of facts before the court,

and the general language there used should not be considered as furnishing a rule for a case like this, in which it is not denied that the notice of motion to dismiss was given before the filing of the transcript on appeal.

Appeal dismissed.

MCFARLAND, J., PATERSON, J., SHARPSTEIN, J., HARRISON, J., GAROUTTE, J., and BEATTY, C. J., concurred.

The following is the opinion above referred to, rendered by the court in Bank on December 11, 1890:—

The COURT.—This is a motion to dismiss appeal because the transcript was not filed in time. The judgment was rendered May 26, and appeal taken June 12, 1890. September 16th, ninety-four days after the taking of the appeal, the clerk of the court below issued his certificate, showing that no transcript had been prepared or certified. September 20th, notice of motion to dismiss was given, accompanied with a copy of the clerk's certificate. This was served at 9:30, A. M. At 3:30, P. M., the fee for filing the transcript was paid to the clerk of this court, but the transcript was not then delivered to said clerk. At eight, P. M., of that day, the transcript was served on counsel for respondent, and at eleven, P. M., the clerk found the transcript in the letter-box at his residence, and marked it filed as of that day. Rule 3 provides that if the transcript is on file when the notice is given, that shall be a sufficient answer to the motion; and counsel now invokes the rule that the court will not take cognizance of fractions of days. We appreciate the force of and the reason for the rule so invoked, and have no doubt sometimes applied it on motions of this kind. But where, as in this case, an event had actually occurred, and a fact been established, under which rights had accrued before the happening of another event, which, if it had occurred a few hours before, might have defeated those rights, we think it the duty of the court

to take note of the order of those events, even though they may all have happened on the same day. The court has been, and possibly ought to be, liberal in the matter of extending time for the filing of transcripts or of relieving parties from the effect of failure, where the delay has been brief and good cause has been shown; but in this case no attempt was made to secure an extension of time, and no cause or excuse is shown for a delay of nearly sixty days in filing a transcript so brief that it could have been, and finally was, in fact, prepared and filed in a single day. If the general rule in regard to fractions of days is inevitably to apply in every such case, rule 3 of this court may as well be repealed, and no limit fixed for the filing of transcripts. Such practice as that adopted in this case is peculiarly adapted to the encouragement of appeals for delay, and ought not to be countenanced by the court. The motion is granted, and the appeal dismissed.

Rehearing denied.

[No. 13809. Department One.—February 5, 1891.]

ABE HASS, ASSIGNEE, ETC., RESPONDENT, *v.* WHITTIER, FULLER & CO., APPELLANTS.

INSOLVENCY—PREFERENCE OF CREDITOR—RECOVERY BY ASSIGNEE—PLEADING.—Unless it appears that an insolvent transferred his property to a creditor within one month before proceedings in insolvency were instituted, with the view or intention on his part to give preference to the creditor, it is immaterial what were the views or motives of the creditor in receiving the property, or what he suspected or believed as to the solvency of the debtor, and the property cannot be recovered from the creditor by the assignee, without an allegation in the complaint as to the intention of the insolvent debtor.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

Barclay, Wilson & Carpenter, for Appellants.

Chapman & Hendrick, and *Graves, O'Melveny & Shankland,* for Respondent.

VANCLIEF, C.—The object of this action is to recover from defendants $856.99, the value of certain personal property alleged to have been sold and delivered to defendants by the insolvent in payment of his debt of $900, within one month before the filing of the petition against him by his creditors, contrary to the provisions of section 55 of the Insolvent Act of 1880. The judgment of the court below was in favor of plaintiff for the sum demanded, and the defendants appeal on the judgment roll, contending that neither the complaint nor the findings of fact states a cause of action. A general demurrer to the complaint was overruled.

So far as applicable to this case, section 55 of the Insolvent Act is as follows: "If any person, being insolvent, or in contemplation of insolvency, within one month before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him, ... makes any payment, assignment, transfer, or conveyance of any part of his property, ... the person receiving such payment, ... having reasonable cause to believe that such person is insolvent, and that such . . . . payment . . . . is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way to hinder, impede, or delay the operation of, or to evade any of the provisions of this act, such transfer, payment, conveyance, pledge, or assignment is void, and the assignee may recover the property, or the value thereof, as assets of such insolvent debtor."

It is neither alleged in the complaint nor found as a fact by the court, that the insolvent transferred the

property to the defendants "with a view to give a preference to any creditor or person having a claim against him"; but it is found that the transfer was made to and received by the defendants in satisfaction of a valid debt of nine hundred dollars due them from the insolvent.

It is further found, however, that the property was *received by the defendants* "with a view to give said defendants a preference, and to pay said indebtedness to said firm (defendants) before and in preference to all other creditors of said Edgar Sessions, and with a view to prevent the said property so transferred from coming to his assignee in insolvency, and to prevent the same from being distributed ratably among his creditors, and to defeat the object of the said Insolvent Act of 1880; and the said defendants, and each of them, at the time of said assignment and transfer and acceptance of said property, had reasonable cause to believe, and as plaintiff is informed and believes well knew, that the said Edgar Sessions was insolvent, and that said transfer and assignment was made for the purpose above mentioned,"—this finding being copied from the complaint.

Unless the insolvent transferred the property with the view or intention to give preference to some creditor or person having a claim against him, it makes no difference what were the views or motives of the defendants in receiving the property, or what they suspected or believed about the solvency of Sessions.

I think the judgment should be reversed, and the cause remanded, with instructions to the court below to sustain the demurrer to the complaint.

FOOTE, C., and BELCHER, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment is reversed, with instructions to the court below to sustain the demurrer to the complaint.

Hearing in Bank denied.

[No. 13725. Department One.—February 5, 1891.]

THE SOUTHERN CALIFORNIA NATIONAL BANK OF LOS ANGELES, RESPONDENT, *v.* H. C. WYATT ET AL., DEFENDANTS, AND A. H. BUSCH, APPELLANT.

NEGOTIABLE PAPER—LIABILITY OF SURETY—NOTICE OF DEMAND AND NON-PAYMENT.—One who subscribes his name upon the face of a joint note as an accommodation maker, with the word "surety" appended to his signature, is liable under the code as a maker and not as an indorser of the note, and his liability does not depend upon due notice of demand and non-payment.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

Graves, O'Melveny & Shankland, for Appellant.

Barclay, Wilson & Carpenter, and *Gottschalk & Luckel,* for Respondent.

BELCHER, C.—This is an action upon a promissory note dated December 5, 1888, and payable ninety days after date. The instrument appears to be a joint note, signed by each of the defendants, with the word "surety" written after the name of defendant Busch.

The defendants, other than Busch, suffered default. He answered, and alleged that he signed the note neither as maker nor acceptor, and "that he wrote his name upon said negotiable instrument as a surety, without any consideration whatever, but solely for the accommodation of the makers of said instrument, and delivered it, with his name thereon, to co-defendant Mitchell, who delivered the same to the plaintiff, all of which facts were known to the plaintiff at the time of said delivery." He further alleged that no notice of the presentment and non-payment of the note was given to

him for more than ten days after its maturity, and that he never waived its presentment or notice of its dishonor.

The court below gave judgment against all of the defendants, and the defendant Busch appeals.

It is contended for the appellant—and this is the only point made—that as he wrote "surety" after his name, and was known by the payee to be a surety for the other makers, he became, in legal effect, an indorser and not a maker of the note, and was discharged from liability thereon, for the reason that no notice of its presentment and non-payment was given to him within the time prescribed by statute. This position is rested upon section 3108 of the Civil Code, which reads as follows: "One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it, with his name thereon, to another person, is called an indorser, and his act is called indorsement."

We do not think the judgment can be reversed on this ground. The next two sections of the code are as follows:—

"Sec. 3109. One who agrees to indorse a negotiable instrument is bound to write his signature upon the back of the instrument, if there is sufficient space thereon for that purpose.

"Sec. 3110. When there is not room for a signature upon the back of a negotiable instrument, a signature equivalent to an indorsement thereof may be made upon a paper annexed thereto."

In *Fessenden* v. *Summers,* 62 Cal. 484, cited by appellant, the note was indorsed in blank by the defendant Thompson, before delivery to the payee. The indorsement was for the purpose of adding credit to the note, and plaintiff made a loan upon the strength of the indorsement. The question was, whether Thompson was to be treated as an indorser or guarantor of the note. It was held that, under sections 3108 and 3117 of the

Civil Code, he was an indorser, and as such entitled to notice of non-payment.

That case is not in point, for the reason that here the appellant did not indorse the note, but signed his name to it in the place of a maker.

Since the decision of *Aud* v. *Magruder,* in 1858 (10 Cal. 282), where, as here, it appeared from an *addendum* to the name of one of the makers of the note in suit that he was a surety thereon, it has been uniformly held by the supreme court of this state that where one subscribes his name to a promissory note in the place of a maker, he will, as between himself and the payee, be treated as a maker, and held liable as such, though he was in fact only a surety for the other makers, and this was known to the payee when he received the note. (*Aud* v. *Magruder,* 10 Cal. 282; *Dane* v. *Corduan,* 24 Cal. 157; 85 Am. Dec. 53; *Damon* v. *Pardow,* 34 Cal. 278; *Chafoin* v. *Rich,* 77 Cal. 476.)

This rule has not been changed by the code, and the appellant was therefore not an indorser of the note, and his liability did not depend upon due notice of demand and non-payment.

We think the judgment should be affirmed, and so advise.

FOOTE, C., and VANCLIEF, C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

[No. 13890. Department One.—February 6, 1891.]

M. N. AVERY, APPELLANT, v. G. A. CLARK ET AL., RESPONDENTS.

VENDOR'S LIEN—EQUITY.—A vendor's lien, properly so called, is not the result of any agreement or intention of the parties, but is a simple equity raised by the courts for the benefit of a vendor of real estate, after he has parted with the title.

ID.—EXPRESS LIEN.—So long as the title is retained, the vendor has an express lien for the unpaid purchase-money, which exists by virtue of the contract of sale and reservation of the title, and for which equity makes no special provision, but leaves the parties to rely upon their contract.

ID.—ASSIGNMENT.—The express lien of a vendor who retains the title is capable of assignment and enforcement by his assignee; but the implied lien raised by equity, in favor of a vendor who has parted with the title, is a privilege purely personal to the vendor, and is not assignable even by express contract, nor does it pass to the assignee of the vendee's obligation for the purchase-money.

ID.—WAIVER—SECURITY FOR PURCHASE-MONEY.—Although it is competent for the vendor to take security for the payment of the purchase price of the land which he has conveyed, and by express agreement not lose the right to resort to his implied lien, yet his taking such security is *prima facie* a waiver of the lien, and in the absence of some agreement to the contrary, the vendee will hold the land discharged from the vendor's lien.

ID.—MORTGAGE—EXPRESS LIEN FOR PURCHASE-MONEY—RELATION.—The fact that a mortgage which the vendor takes at the time of the conveyance is expressed to be for the purchase-money of the land conveyed does not prevent a waiver of the vendor's lien, nor can it have the effect to extend the mortgage lien by relation to the date of the contract of sale.

ID.—MECHANICS' LIENS—MORTGAGE—PRIORITY—SALE OF EQUITY.—The lien of a material-man for lumber furnished for a dwelling will take precedence of a mortgage of the land executed immediately upon a conveyance thereof, but after the time when the materials were commenced to be furnished, notwithstanding the mortgage was given for the purchase price of the land to a vendor who had sold it to the mortgagor prior to the furnishing of any materials, and who had conveyed it to the mortgagor on the same day that he received his own deed from a prior vendor from whom he had purchased it.

ID.—MORTGAGE AT TIME OF CONVEYANCE—PRIORITY—CONSTRUCTION OF CODE.—Section 2898 of the Civil Code, declaring that a mortgage for the price of real property, given at the time of its conveyance, has priority over all other liens created against the purchaser, subject to the recording laws, does not give priority to the mortgage over a lien for building materials furnished to the vendee of the land prior to the conveyance. Such lien has priority over the mortgage, under section 1186 of the Code of Civil Procedure.

ID.—NOTICE BY VENDOR OF EQUITY.—Under section 1192 of the Code of Civil Procedure, the vendor under a contract of sale of land, with knowledge that the vendee is constructing a building thereon, must give notice that he will not be responsible for the improvement, else his interest in the land to its entire extent becomes subject to liens filed pursuant to the law regulating mechanics' liens.

MECHANICS' LIENS—MATERIALS FURNISHED—CONSISTENCY OF FINDINGS—PRESUMPTION UPON APPEAL.—A finding that materials of a specified value were furnished by the claimant of a lien upon a dwelling-house to be used in its construction is not inconsistent with a finding that part of them were furnished by another party, who refused to deliver the same until paid for, and that the claimant paid such other party therefor; and it must be presumed, in support of both findings, where the appeal is upon the judgment roll without a bill of exceptions, that the evidence showed that the claimant of the lien received and furnished the portion of the materials in question under his contract with the owner of the dwelling-house.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

T. J. Carran, and *Walter Bordwell,* for Appellant.

Mechanics' lien cannot take precedence of any lien of which the claimant had notice at the time he commenced to furnish materials or perform labor. (Code Civ. Proc., sec. 1186; *Warden's Assignee* v. *Armat,* 31 Gratt. 260.) The holder of a lien is not required to give notice that he will not be responsible for improvements. (*Williams* v. *Santa Clara M. Ass'n,* 66 Cal. 193.) A vendor has only a lien for his purchase-money, whether he retains the title as security or not. (*Parker* v. *Kelly,* 10 Smedes & M. 194; Jones on Mortgages, ed. 1889, c. 6; *Willis* v. *Wozencraft,* 22 Cal. 616, 617.) One who advances money, though for the express purpose of paying for materials furnished, is not entitled to a lien. (*Godeffroy* v. *Caldwell,* 2 Cal. 491; 56 Am. Dec. 360.) Materials furnished after the mortgage was given can have no precedence over it. (*Manchester* v. *Searle,* 121 Mass. 418; *Capron* v. *Strout,* 11 Nev. 311–313.) The deed and mortgage between the vendor and vendee

were but the continuance of the pre-existing relations of the parties. (*Stoner* v. *Neff*, 50 Pa. St. 258; Jones on Mortgages, secs. 189, 217.)

Wells, Guthrie & Lee, C. McFarland, and *Albert Crutcher,* for Respondents.

A vendor's lien is a personal privilege of the vendor, and is not assignable. (*Dingley* v. *Bank of Ventura,* 57 Cal. 470; *Ross* v. *Heintzen,* 36 Cal. 313; *Bancroft* v. *Cosby,* 74 Cal. 584; *Baum* v. *Grigsby,* 21 Cal. 172; 81 Am. Dec. 153; *Williams* v. *Young,* 21 Cal. 227.) The lien was merged and extinguished by the mortgage. Robbins, by consenting to and advising the erection of the dwelling, is estopped from claiming a prior lien. (*Escolle v. Franks,* 67 Cal. 137; *Fishbeck* v. *Phœnix Ins. Co.,* 54 Cal. 422; *Dikeman* v. *Norrie,* 36 Cal. 94; *Kennedy* v. *Dunn,* 58 Cal. 340; *Elliott* v. *Wohlfrom,* 55 Cal. 384; Herman on Estoppel, 1068; *Masterson* v. *West End N. G. R. Co.,* 72 Mo. 342.) Robbins was bound by the lien by reason of not disaffirming responsibility by notice. (Code Civ. Proc., sec. 1192; *Phelps* v. *Maxwell's Creek G. M. Co.,* 49 Cal. 336; *Moore* v. *Jackson,* 49 Cal. 109; *Fuquay* v. *Stickney,* 41 Cal. 583.) The whole lien relates to the commencement of supplying materials, and no part can be postponed to the mortgage. (*Germania B. & L. Ass'n* v. *Wagner,* 61 Cal. 349; *Barber* v. *Reynolds,* 44 Cal. 520; *Tibbetts* v. *Moore,* 23 Cal. 208; *McCrea* v. *Craig,* 23 Cal. 522; *Lumber Co.* v. *Gottschalk,* 81 Cal. 641.)

HARRISON, J.—This is an action for the foreclosure of a mortgage made by the defendants Humeston to one Robbins, and by him assigned to the plaintiff. The defendants, other than the mortgagors, are claimants of mechanics' liens for labor and materials furnished in the construction of a dwelling-house upon the premises described in the mortgage. Judgment was rendered for a sale of the premises, and directing that out of the pro-

ceeds of the sale the claims of the respondents (McCarthy, Clark & Humphreys) should have priority in payment over the mortgage claim of the plaintiff. From this judgment the plaintiff has appealed, upon the ground that his claim was the first lien upon the lands.

The case is here upon the judgment roll alone, and presents the following facts: September 24, 1888, A. S. Robbins, the plaintiff's assignor, being in possession of a lot of land in Los Angeles under a contract of purchase from one Griffes, who was the owner, made an agreement with the defendant Cassie M. Humeston to sell her the same for the sum of two thousand two hundred dollars, of which she then paid two hundred dollars, and took possession of the land. This agreement was never recorded. In the latter part of October of the same year, the defendant R. C. Humeston, husband of said Cassie, with her consent, and at the advice of Robbins, began the construction of a dwelling-house upon the lot, which was completed April 16, 1889. No written contract was made for the construction of the house, and its value or cost exceeded one thousand dollars.

January 5, 1889, Griffes executed to Robbins a deed of the lot, and on the same day Robbins conveyed it to Mrs. Humeston, and at the same time Mrs. Humeston and her husband gave him their four promissory notes for five hundred dollars each, for the unpaid amount of the price thereof, and executed the mortgage in question to secure their payment. Both of the deeds were recorded on the day of their date, and the mortgage two days thereafter.

March 19, 1889, the plaintiff purchased the mortgage and notes from Robbins, who on that day "assigned" them to him.

Prior to the date of this mortgage, viz., December 3, 1888, the respondents Clark & Humphreys entered into a verbal contract with R. C. Humeston to furnish lumber and other materials as might be required in the

construction of the house, and between that day and April 10, 1889, furnished materials which were used in such construction to the value of $2,017, for which they afterwards filed their claim of lien. At the time of making this contract they knew that Mrs. Humeston claimed the land under a contract, and was indebted to Robbins for the purchase-money to the extent of two thousand dollars. The court does not find on what day Clark & Humphreys commenced to furnish the materials, other than that it was "between the third day of December, 1888, and April 10, 1889"; but it is conceded in the brief of counsel for appellant that they commenced to furnish them on the third day of December, 1888.

It is contended by the appellant that by virtue of the contract of sale between Robbins and Mrs. Humeston, there was created in favor of Robbins a vendor's lien for the unpaid portion of the purchase-money, which was preserved in the mortgage that was taken at the time Robbins conveyed the property to her, and that the right to enforce this lien passed to the plaintiff by the assignment to him of the notes and mortgage, and has priority over the liens of the respondents.

A vendor's lien is not the result of any agreement or any intention of the vendor and vendee, but is a simple equity raised by courts for the benefit of the vendor of real estate. It is a privilege purely personal, and cannot exist in favor of any but the vendor. It does not exist in his favor if he has other security for the land which he has conveyed. It is not assignable, even by express contract, nor does it pass to the assignee of the vendee's obligation for the purchase-money.

It has been uniformly held in this state that this lien is lost by any act on the part of the vendor manifesting an intention on his part not to rely upon the lien, and that, although it is competent for him to take security for the payment of the purchase price of the land, and by an express agreement not lose his right to resort to

this lien, yet his taking such security is *prima facie* a waiver of the lien, and, in the absence of some agreement to the contrary, the vendee will hold the land discharged from such lien. In *Hunt* v. *Waterman,* 12 Cal. 301, the vendor had taken a mortgage on the property sold, for the payment of the entire purchase-money, but by reason of some defect the mortgage was unavailing as a security. He then brought an action to foreclose his vendor's lien. The court says: "The question in this case is directly presented whether in this state a vendor's lien exists when a mortgage security is taken for the purchase-money. Decisions of the various courts have been numerous on this branch of jurisprudence, and are not harmonious. The better rule, supported by the weight and number of authorities, is to hold the silent lien of the vendor extinguished whenever the vendor manifests an intention to abandon, or not to look to it; and it is held that he does this whenever he takes other and independent security upon the same land, or a portion of the same land, or on other land. When he looks to other security, he loses this tacit lien." In *Baum* v. *Grigsby,* 21 Cal. 172, 81 Am. Dec. 153, Judge Field, delivering the opinion of the court, says: "When any other independent security is taken,—as a mortgage on the land or upon other property, or the personal responsibility of a third person,—the lien is held to be waived, unless there is at the time an express agreement for its retention. The taking of a distinct, independent security is presumptive evidence of the waiver."

It is also the established rule in this state that this lien is not assignable, and that the assignee of the right to recover the money for which the land was sold cannot enforce the lien. (*Baum* v. *Grigsby,* 21 Cal. 172; 81 Am. Dec. 153; *Camden* v. *Vail,* 23 Cal. 633.) In *Baum* v. *Grigsby,* 21 Cal. 172, 81 Am. Dec. 153, the court says: "The cases which deny that the lien passes with the personal security of the vendee do not rest, except in

a few instances, upon the want of a special assignment from the vendor, but upon the ground that the lien is in its nature unassignable, and to that conclusion we have arrived. . . . . The assignee of a note given for the purchase-money has not parted with the property which he seeks to reach, in consideration of the note he has received. He has never held the property, and has, therefore, no special claims upon equity to subject it to sale for his benefit. The particular equity of the vendor in this respect cannot, in the nature of things, be asserted by another."

These principles were afterward formulated in the Civil Code, which provides:—

"Sec. 3046. One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.

"Sec. 3047. Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract."

Properly speaking, a vendor's lien does not exist until the vendor has parted with his title. So long as he retains the title he cannot be said to have any implied lien upon the land. The security which he then has for the purchase-money is created by express reservation, and cannot be impaired by any act of the vendee. This is an *express* lien existing by virtue of a contract executed between the parties, and is capable of assignment and enforcement by his assignee. (*Taylor* v. *McKinney*, 20 Cal. 618.) Such a lien is open and manifest to the world, and is entirely different from the secret, invisible lien which the law implies in behalf of the vendor when he parts with the title, and which is known only to the parties to the transaction, and those to whom they may communicate the fact. For such a lien equity

makes no special provision, but leaves the parties to rely upon the contract which they have executed between themselves.

Whatever was the nature of the security held by Robbins prior to January 5, 1889, by virtue of the contract of sale between him and Mrs. Humeston, whether it was a vendor's lien or a lien in the nature of a mortgage, or whether, inasmuch as he did not himself have the title to the land, it was a security differing from either of these, when he took the promissory notes of Mrs. Humeston and her husband, secured by their mortgage upon the land which he then conveyed to her, he waived whatever lien he had prior to that date, and thereafter had only the lien that existed by virtue of the mortgage. The unpaid price of the land did not thereafter "remain unsecured otherwise than by the personal obligation of the buyer." In addition to her personal obligation, he had the personal obligation of her husband, together with their mortgage on the land to secure the same. By these acts his vendor's lien, if he had any, was extinguished, and his prior security was merged in the mortgage, and became an open, public, and express lien. Nor did the insertion in the mortgage of the clause, "This mortgage is given in part-payment of the purchase-money of the within described property," have the effect to extend the lien, by relation, to the date of the contract of sale. These words do not constitute or imply any agreement or intention for the preservation of a prior lien. The fact that the mortgage which the vendor takes at the time of the conveyance is expressed to be for the purchase-money of the land is none the less a waiver of his vendor's lien.

The plaintiff in this case has, however, only such rights of lien upon the land as Robbins could transfer, and such as he did transfer on the 19th of March, 1889, by his assignment of the notes and mortgage. He does not in his complaint allege any assignment to him of

any other lien than was created by the mortgage,—his allegation being that "on the nineteenth day of March, 1889, for a valuable and sufficient consideration, said plaintiff purchased said mortgage and notes from said A. S. Robbins, who then and there duly assigned, transferred, set over, and delivered the same to the plaintiff"; and the finding of the court is in accordance with this allegation. We have seen above that as the assignee of Robbins he is not entitled to assert any vendor's lien in his own behalf.

Section 1186 of the Code of Civil Procedure declares that "the liens provided for in this chapter are preferred to any lien, mortgage, or other encumbrances which may have attached subsequent to the time when . . . . the materials were commenced to be furnished."

Inasmuch as the only lien which the plaintiff has is that of his mortgage, which did not attach to the land until January 5, 1889, and as the respondents commenced to furnish the materials for which their lien was allowed prior to that date, it follows that their lien was preferred to the lien of the plaintiff.

Nor do the provisions of section 2898 of the Civil Code give to the plaintiff, under the facts of this case, priority for the lien of his mortgage in disregard of this section. Section 1192 of the Code of Civil Procedure provides that "Every building . . . constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming an interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter," unless such person shall give notice that he will not be responsible for the same. Not only did Robbins fail to give any such notice, but the court finds that he "consented to and advised the construction of said dwelling-house." Although he was not the "owner" of the lands until

January 5, 1889, yet by virtue of his contract with Griffes, he was until that date, and for several months prior to the time when the respondents began to furnish materials, a "person having or claiming an interest therein," and that interest, to its entire extent, became subject to their lien.

The principle upon which liens are allowed in favor of mechanics and material-men is, that their labor and materials have given value to the buildings upon which they have been expended, and that it is inequitable that the owner of the land, who has contracted with them for such improvement, or who has stood by and seen the improvement in progress without making objection, should have the benefit of their expenditures without making compensation therefor. Even in the absence of the foregoing provisions of the code, it would be in contravention of well-established rules if, under the facts of this case, the lien of Robbins should have priority over that of the respondents. Having advised the construction of the dwelling-house upon land then owned by him, under the most elementary principles of equity he would not be permitted to avail himself of this increased value for the purpose of enhancing his own security at the expense of those who had themselves given value to the land.

There was no error in allowing to Clark & Humphreys as a portion of their claim, the sum of $190 for certain glass used in the building. The court found that Clark & Humphreys furnished to the defendant R. C. Humeston materials of the value of $2,037.84, to be used in the construction of the dwelling-house, and that "of and included in said amount is a claim for glass, amounting to $190, furnished by the firm of Schlesinger & Goldwater," and that Schlesinger & Goldwater refused to deliver the same until paid for. The court does not find that Schlesinger & Goldwater furnished the glass to Humeston, but does find that the material fur-

nished by Clark & Humphreys to Humeston was of the above value, and that included in this amount was this claim for glass which Schlesinger & Goldwater refused to deliver until paid for, and that Clark & Humphreys paid Schlesinger & Goldwater for the glass. These findings are entirely consistent with the fact that Clark & Humphreys agreed with Humeston to furnish the glass for the dwelling-house, and for that purpose bought the same from Schlesinger & Goldwater, but that Schlesinger & Goldwater refused to deliver the glass to them until it was paid for, and that thereupon Clark & Humphreys paid for the glass, and furnished it according to their contract with Humeston. As the appeal is taken upon the judgment roll without any bill of exceptions, we must assume that the evidence was sufficient to support all the findings of the court.

The foregoing principles, which give priority to the lien of Clark & Humphreys, are also applicable to the lien of McCarthy. We cannot say that the description of the land in the claim of lien filed by him is not "sufficient for identification." (Code Civ. Proc., sec. 1187.)

The judgment of the court below is affirmed.

PATERSON, J., and GAROUTTE, J., concurred.

Hearing in Bank denied.

[No. 13730. In Bank.—February 7, 1891.]

GEORGE R. SHATTO, RESPONDENT, *v.* H. A. CROCKER, APPELLANT.

MALICIOUS PROSECUTION—DAMAGES—INJURY TO FEELINGS—PLEADING—EVIDENCE.—In an action for damages for malicious prosecution of a criminal action, injury to the plaintiff's feelings, caused by the arrest, may be proved under the general allegations of damages, and need not be specially pleaded.

ID.—EVIDENCE—PROCEEDINGS IN CRIMINAL ACTION—INSUFFICIENT OBJECTION.—An objection to the introduction of certified copies of all the proceedings in the criminal action, the papers being attached together and objected to as a whole, is prop-

erly overruled where part of the evidence offered is clearly admissible, and no specification is made as to the particular papers objected to.

ID.—COPY OF JUSTICE'S DOCKET.—A certified copy of the entries in a justice's docket is *prima facie* evidence of the facts stated, and is admissible for plaintiff in an action for malicious prosecution of a criminal proceeding before the justice.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

J. M. Damron, for Appellant.

Anderson, Fitzgerald & Anderson, for Respondent.

PATERSON, J.—This is an action for damages occasioned by the malicious prosecution of a criminal action against the plaintiff before a justice of the peace of Los Angeles County.

The findings of the court were in favor of the plaintiff, and judgment was entered against the defendant for the sum of four hundred dollars and costs.

Appellant claims that the court erred in permitting the plaintiff to testify to the injury to his feelings, caused by the arrest, the only special damages alleged being twenty-five dollars paid an attorney for the defense of the respondent in a criminal action, and fifty dollars loss on account of detention from business for two days.

We think that the evidence was properly allowed under the general allegations as to damages. Bodily pain and suffering come under the head of general damages, because they result naturally and directly from bodily harm, and injuries to the feelings flow as naturally and as directly from treatment like that complained of herein. (1 Sutherland on Damages, secs. 763–766.)

Appellant contends, also, that the court erred in overruling his objection to the introduction in evidence of

copies of the complaint, warrant of arrest, proceedings, and docket entries in the criminal action tried before the justice of the peace certified by the latter.

The papers were attached together, and were objected to as a whole. They included a certified copy of the entries in the docket. Such copy is made *prima facie* evidence of the facts stated by the provisions of section 912 of the Code of Civil Procedure. As some of the evidence offered as a whole was admissible, and as appellant failed to specify any particular portion to which he addressed his objection, there was no error in the ruling of the court. (*Board of Education* v. *Keenan,* 55 Cal. 647.) Furthermore, it appears from the defendant's own evidence that he prosecuted the case referred to, and that the plaintiff was acquitted.

Judgment and order affirmed.

HARRISON, J., and GAROUTTE, J., concurred.

[No. 13909. In Bank.—February 9, 1891.]

W. B. WINN, RESPONDENT, *v.* RODY SHAW, APPELLANT.

COUNTY GOVERNMENT ACT—PURCHASE OF REAL PROPERTY—PUBLICATION OF NOTICE—MANDATORY STATUTE—POWER OF SUPERVISORS.—The provision of the County Government Act requiring the board of supervisors of a county to publish notice of their intention to make a purchase of real property for the benefit of the county in some newspaper of general circulation published in the county, etc., is mandatory, and operates as a limitation upon the power of the board to make any purchase of real property unless the publication is made as directed.

ID.—PRICE OF PUBLICATION — COMBINATION OF NEWSPAPERS.—The fact that no newspaper published in the county is willing to publish the notice for the price fixed by the supervisors, and that all the newspapers published in the county have combined to charge higher rates for advertising than the board are willing to pay, cannot affect or alter the jurisdiction of the board, or confer upon it power to purchase real property without making the publication required by the statute.

ID.—VALIDITY OF NEWSPAPER COMBINATION.—The question as to the validity of a contract between newspapers adopting a

uniform schedule of prices for advertising and printing, including all county work, is not involved in an action to prevent an illegal payment for land purchased by the supervisors without the publication of any notice.

ID.—INJUNCTION — RESTRAINING AUDITOR FROM DRAWING ILLEGAL WARRANT—SUIT BY TAX-PAYER.—A tax-payer may sue to enjoin the county auditor from drawing his warrant in payment for the purchase of land of which no notice has been published.

ID.—INTEREST OF TAX-PAYER.—A tax-payer of a county has such an interest in the proper application of funds belonging to the county that he may maintain an action to prevent their withdrawal from the treasury in payment or satisfaction of demands which have no validity against the county.

ID.—DAMAGE TO COUNTY—ILLEGAL PURCHASE.—It cannot be inquired whether the county will gain or lose by an illegal purchase of land, in an action to restrain the drawing of a warrant in payment therefor, it being sufficient to support the action that the purchase was made without authority of law.

APPEAL from a judgment of the Superior Court of San Benito County.

The facts are stated in the opinion of the court.

Briggs & Hudner, for Appellant.

This action will not lie to restrain the drawing of a warrant, there being an adequate remedy at law for the county. (County Government Act, secs. 6, 8; *Branch Turnpike Co.* v. *Supervisors,* 13 Cal. 190; *Trinity Co.* v. *McCammon,* 25 Cal. 120; *Linden* v. *Case,* 46 Cal. 174; *McCoy* v. *Briant,* 53 Cal. 249; *Cohen* v. *Gray,* 70 Cal. 85; *Hedges* v. *Dam,* 72 Cal. 522; *Merriam* v. *Supervisors,* 72 Cal. 519; *Doolittle* v. *Supervisors,* 18 N. Y. 162; *Roosevelt* v. *Draper,* 23 N. Y. 323.) It does not appear that the county will suffer any damage. (*Trinity Co.* v. *McCammon,* 25 Cal. 121; *Mechanics' Foundry* v. *Ryall,* 75 Cal. 602.) This is not a proceeding to set aside the order of the supervisors or to annul it, and it remains as passed. (*Colusa Co.* v. *De Jarnett,* 55 Cal. 373; *Fall* v. *Paine,* 23 302; *Tilden* v. *Sacramento,* 41 Cal. 70.) Plaintiff cannot take advantage of his own wrong in refusing to publish notice. (Civ. Code, secs. 3515, 3517.) The combination of the newspapers was illegal. (*Valentine* v. *Stewart,* 15

Cal. 388; *Swan* v. *Chorpenning,* 20 Cal. 182; *Spence* v. *Harvey,* 22 Cal. 337; 83 Am. Dec. 69; *Packard* v. *Bird,* 40 Cal. 378; *Edwards* v. *Estell,* 48 Cal. 194; *Danielwitz* v. *Sheppard,* 62 Cal. 340; *Santa Clara V. M. & L. Co.* v. *Hayes,* 76 Cal. 387; 9 Am. St. Rep. 211; *Brisbane* v. *Adams,* 3 N. Y. 129; *Saratoga Co. Bank* v. *King,* 44 N. Y. 87; *Amot* v. *Pittsburg E. C. Co.,* 68 N. Y. 566.)

Montgomery & Scott, Michael Mullany, and *William Grant,* for Respondent.

The board had no power to purchase the land without publication of notice. (County Government Act, sec. 25; Dillon on Municipal Corporations, secs. 447–449.) Injunction will lie at suit of a tax-payer to restrain an unauthorized payment of county funds. (*Sands* v. *Pfeiffer,* 10 Cal. 264; *Foster* v. *Coleman,* 10 Cal. 280; *Shakespear* v. *Smith,* 77 Cal. 638; 11 Am. St. Rep. 327; *Andrews* v. *Pratt,* 44 Cal. 309; *McCord* v. *Pike,* 121 Ill. 28; 2 Am. St. Rep. 85, and note; 2 High on Injunctions, last ed., secs. 1251, 1298, 1309; 2 Dillon on Municipal Corporations, 4th ed., secs. 504, 914, et seq.)

DE HAVEN, J.—This is an appeal by the defendant, Shaw, who is the auditor of the county of San Benito, from a judgment enjoining him, as such auditor, from drawing a warrant of said county in favor of one Hodges. The court found that the plaintiff is a resident, elector, and tax-payer in the county of San Benito; that the board of supervisors of said county made an order declaring their intention to purchase from one Hodges, for the sum of $550, a certain described piece of land for the use of the county, and directed the clerk to give notice of said intention, as required by law; that there were at all times two newspapers of general circulation published in said county, but said notice of intention was not published in any newspaper in said county; that without such publication, the board of supervisors, at the time

fixed in said notice of intention, passed an order to purchase said real estate, and directed the appellant, as auditor, to draw his warrant on the county treasurer for the sum of $550 in favor of said Hodges, upon the delivery of a deed conveying the title to said land, to be approved by the district attorney, and that defendant threatens, and will, unless restrained, draw said warrant, in accordance with said order.

The findings further show that in January, 1890, the board of supervisors of said county fixed the price of all county advertising for the ensuing year at seventy-five cents per square for the first insertion, and twenty-five cents for each subsequent insertion. In March following, the plaintiff and one Shaw, who were the proprietors of the two only newspapers published in the county, entered into an agreement, adopting a uniform schedule of prices to be charged by them for advertising and printing, stipulating that the same should "extend to all county work, and, where possible and necessary, said county work shall be divided as equally between the two offices as possible, each receiving a profit proportionate to the work done." By this agreement said newspaper proprietors were to charge for county printing one dollar and fifty cents per square, first insertion, and seventy-five cents per square for each subsequent insertion.

The court further finds that neither of said newspapers was "willing" to publish said notice of intention for the price fixed by the board of supervisors, "but they were at all times willing and able to publish the same at the rate fixed by their agreement."

It is also averred in the complaint, and not denied in the answer, "that the said sum of money will be paid by the treasurer of the said county of San Benito to said J. I. Hodges upon receipt of said warrant and the delivery of said deed."

The foregoing constitute all the material facts necessary to be considered in giving judgment on this appeal.

1. The County Government Act provides as follows:—

"Sec. 25. The boards of supervisors in their respective counties have jurisdiction and power, under such limitations and restrictions as are prescribed by law: . . . . 8. To purchase . . . . any real or personal property necessary for the use of the county; . . . . but no purchase of real property must be made unless a notice of the intention of the board to make such purchase, describing the property to be purchased, the price to be paid therefor, from whom it is proposed to be purchased, and fixing the time when the board will meet to consummate such purchase, shall be published for at least three weeks in some newspaper of general circulation published in the county, or if none be published in the county, then by posting such notice," etc.

This provision of the statute prescribing the manner in which the board shall proceed in making a purchase of real property cannot be construed as simply directory, but such provision operates as a limitation upon the power of that body to make any purchase of real property; and unless the publication is made as directed, the board has no jurisdiction to act at all. The manifest design of the law is, that notice of such proposed action shall be given to the tax-payers of the county whose property may be affected by such a purchase, so that by remonstrance or petition they may be able to prevent it or at least be afforded the opportunity to be heard in the matter; and we have no doubt that a compliance with the statute in this respect is essential to the validity of any such contract of purchase.

It is urged, however, that to hold this provision of the statute mandatory is to place it in the power of newspaper publishers to enter into illegal combinations, which, in effect, deprive the board of supervisors of any voice in the matter of determining what shall be paid by the county for such publications, or of exercising any judgment in relation to such subject. And it is argued

that this case affords an illustration of the manner in which a county may be subjected to the payment of exorbitant charges, or else cease to perform such governmental functions as, in order to be legally exercised, require published notice at some stage of the proceeding, one instance of which is to be found in the section of the County Government Act relating to the enactment of ordinances. This is an argument, however, which could more properly be addressed to the legislature. The language of the statute under consideration is plain, and the court must give effect to it as it is written; and if the evils suggested are likely to flow from this construction, the remedy must be by legislative action. Doubtless the law could be amended so as not to destroy its efficiency, by providing that the publication may be made in any paper circulating in the county, or giving the board a discretion in selecting a paper likely to give notice.

2. The appellant contends that a tax-payer cannot maintain an action in this class of cases, and as authority for this position refers to the cases of *Linden* v. *Case,* 46 Cal. 174; *McCoy* v. *Briant,* 53 Cal. 249; and *Merriam* v. *Board of Supervisors,* 72 Cal. 519. While there is some general language in each of these cases which lends support to the contention of the appellant on this point, still they are on facts distinguishable from this, as in neither of them did it appear that the remedy of injunction was necessary in order to keep the county money from being illegally drawn from the treasury. But be that as it may, we are of opinion that a tax-payer of a county has such an interest in the proper application of funds belonging to the county that he may maintain an action to prevent their withdrawal from the treasury in payment or satisfaction of demands which have no validity against the county. The weight of authority seems to be in harmony with this view. (*Crampton* v. *Zabriskie,* 101 U. S. 601; 2 Dillon on Municipal Corporations, 4th ed., secs. 914, 922.)

In *Foster* v. *Coleman,* 10 Cal. 279, the right of the taxpayer to maintain such an action seems to have been assumed; and in the later case of *Shakespear* v. *Smith,* 77 Cal. 638, 11 Am. St. Rep. 327, it was held that a taxpayer of a school district could compel the cancellation of an illegal warrant drawn upon the superintendent of schools, and that such officer could, in the same action, be restrained from drawing a requisition on the county auditor, as directed by such illegal order.

3. It is further urged that there is no allegation or finding that the county or plaintiff will suffer any damage if the land of Hodges is accepted and paid for; that it does not appear that its value is any less than the price agreed to be paid for it. But the question here is not whether the county will profit or lose by the transaction. If the law forbids the making of such a contract unless preceded by publication of the notice of intention to make it, that must be the end of the matter, as in such case there can be no legal liability on the part of the county to pay, and the object of this action is to prevent an illegal payment of public money. The principle was applied in *Shakespear* v. *Smith,* 77 Cal. 638; 11 Am. St. Rep. 327. In that case it was not denied that the school district was justly indebted to the payee in the order named, and the court said: "The only vice in the transaction consists in its allowance by a party in interest, which raises an implication of fraud, and renders the order void." The vice of the contract in this case is, that it was made without authority of law, and this appearing, it is void.

There are other matters discussed in the brief of counsel, but we have not thought it necessary to discuss them.

The question as to the validity of the contract made between the proprietors of the newspapers is not involved in this case. Judgment affirmed.

BEATTY, C. J., MCFARLAND, J., HARRISON, J., PATERSON, J., SHARPSTEIN, J., and GAROUTTE, J., concurred.

[No. 20190. In Bank.—February 9, 1891.]

EX PARTE CHARLES HENRY CLARK, ON HABEAS CORPUS.

ADOPTION—VOID ORDER—DIFFERENT NAMES.—An order of adoption of a child is void, and affords no warrant for the detention of the child from its parents, where it appears that the parents consented to the adoption of the child by a person of one name, that the agreement to adopt is signed by another name, and that the detention is by a person whose name does not appear in the record of the proceeding, there being nothing in the record to show that the three names indicate one and the same person.

ID.—RESIDENCE OF PERSON ADOPTING.—It is essential to the validity of an adoption that the record should show that the person adopting the child is a resident of the county in which the order of adoption was made.

ID.—SUPERIOR COURT—SPECIAL AND LIMITED JURISDICTION.—In cases of adoption, the power of the superior court is special and limited, and not exercised according to the course of the common law; and its jurisdiction must affirmatively appear by the record as to both subject-matter and the person, notwithstanding the court is one of general jurisdiction.

ID.—COMMON LAW—STATUTORY RIGHT—STRICT COMPLIANCE WITH STATUTE.—The right of adoption is purely statutory, and unknown to the common law and repugnant to its principles; and the provisions of the statute must be strictly followed, and every condition prescribed therein strictly complied with, else the child by adoption cannot inherit from the adopting parent.

ID.—RIGHTS OF NATURAL PARENTS—DOUBTS RESOLVED IN THEIR FAVOR.—No transfer of the rights of natural parents can be acquired by adopting parents unless the statute regulating adoption is strictly followed, and all doubts in controversies between the natural and the adopting parents should be resolved in favor of the former.

ID.—HABEAS CORPUS—AMENDMENT OF RECORD OF ADOPTION.—Proceedings taken to amend the record of adoption pending the determinations, upon writ of *habeas corpus*, of the right to a transfer of the child from the custody of the adopting parties to the custody of its natural parents, cannot affect the decision of the court upon the writ, which must take the record as it finds it, and determine the rights of the parties accordingly.

ID.—ESTOPPEL OF PARENTS—ACQUIESCENCE.—The natural parents are not estopped from asserting their right to the custody of their child as against an illegal order of adoption, by acquiescence in the claim of the adopting parents for several years.

ID.—FITNESS FOR CUSTODY OF CHILD.—The relative fitness of the respective parties to care for the child cannot be inquired into upon *habeas corpus*, if it is conceded that both parties are competent and fit persons to care for the child

ID.—EMANCIPATION OF CHILD—CONSENT TO ILLEGAL ADOPTION.—Although a parent is not entitled to the custody of a child who is old enough to work and care for himself, after consenting to his emancipation, there can be no basis for such a claim, where the minor is a young child incapable of caring for himself, because of mere consent of the parents to an illegal order of adoption.

PROCEEDING in the Supreme Court upon writ of *habeas corpus*. The facts are stated in the opinion of the court.

M. Cooney, for Petitioner.

Henry I. Kowalsky, for Respondents.

PATERSON, J.—Petitioner is the mother of Charles Henry Clark, a minor, and the respondents, who are husband and wife, claim that he has become their child by adoption. This claim is based upon an order made November 16, 1888, by Hon. John F. Finn, one of the judges of the superior court of the city and county of San Francisco. Attached to the order is a written consent signed by James P. Clark and Annie E. Clark, the parents of the child, consenting that "said Charles Henry Clark may be adopted by Jacob Reulein." Following this is a written agreement and consent signed by *David* Reulein and Mrs. Kate Reulein, in which the latter consents that David Reulein might adopt the child, and in which David Reulein agrees to adopt the child and treat him thereafter in all respects as his own lawful child. The order of the judge recites that the parents, James P. and Annie E. Clark, and Jacob Reulein and Katie Reulein, his wife, appeared before him, bringing with them said Charles Henry Clark, aged two years and eleven months; that he examined each of said persons separately, and from such examination found that Jacob Reulein was desirous of adopting said Charles; that his wife, Katie, consented to such adoption, and that it was for the best interests of the child that such adoption should take place; that the parents

having signed the necessary consent, and said *Jacob* Reulein having executed the proper agreement, it was therefore ordered that said Charles Henry Clark should thenceforth be regarded and treated in all respects as the child of said Jacob Reulein.

The petitioner herein alleges that the child is restrained of his liberty by *John D.* Reulein and Katie Reulein. The writ was addressed to them, and an answer has been filed, signed by John D. Reulein and Katie Reulein, admitting that they hold the custody of the child, and claiming the right to do so under the order above referred to.

It will be observed that the parents consented to the adoption of their child by *Jacob* Reulein; that the agreement to adopt is signed by *David* Reulein; and that the order of the court gives the child to *Jacob* Reulein. There is nothing in the record of the proceeding to show that the names Jacob Reulein, David Reulein, and John D. Reulein indicate one and the same person.

In our opinion, the order is void, and affords respondents no warrant for the detention of the child. It confers no right upon them, and is manifestly too uncertain, when read in connection with the agreements and consents upon which it was based, to render any one liable as the parent by adoption,—especially one whose name does not appear in the record at all.

There is another objection which is fatal to the validity of the proceeding. Section 226 of the Civil Code provides that all the persons interested must appear before the judge of the superior court *of the county where the person adopting resides.* There is nothing in the order, or in any of the papers referred to, showing that Jacob Reulein, or David Reulein, was a resident of the city and county of San Francisco. It has been held—and we think correctly—that, in cases of this kind, the power of the court being special, and not exercised according to the course of the common law, its decisions

must be regarded and treated like those of courts of limited and special jurisdiction; and that jurisdiction in such cases, although the court be one of general jurisdiction, must appear by the record, as to both subject-matter and the person. (*Furgeson* v. *Jones,* 17 Or. 204; 11 Am. St. Rep. 808.)

We have held that our law of adoption is not unconstitutional (*Estate of Stevens,* 83 Cal. 322), but to acquire any right under it its provisions must be strictly followed, and all doubts in controversies between the natural and the adopting parents should be resolved in favor of the former. A child by adoption cannot inherit from the adopting parent unless the act of adoption has been done in strict accordance with the statute. No matter how persuasive may be the equities of the child's case, or how clear the intention of all parties, it must appear that the statutory conditions have been strictly performed, otherwise the relation never existed, and the right to inherit never was acquired. The right of adoption is purely statutory. It was unknown to the common law, and as the right when acquired under our statute operates as a permanent transfer of the natural rights of the parent, it is repugnant to the principles of the common law, and one who claims that such a change has occurred must show that every requirement of the statute has been strictly complied with. It cannot be said that one condition is more important than another. (*Tyler* v. *Reynolds,* 53 Iowa, 146; *Shearer* v. *Weaver,* 56 Iowa, 578.)

It was stated on the argument that proceedings were pending before Judge Finn to amend the record so as to show that the respondent John D. Reulein is the same person referred to in the proceedings as Jacob Reulein and David Reulein. Assuming that the power to amend the record as suggested exists,—a matter upon which we express no opinion,—we must on *habeas corpus* take the

record as we find it, and determine the rights of the parties accordingly.

Counsel for respondents earnestly urge the court to consider that the claim of respondents has been acquiesced in for several years by the petitioner; that respondents have treated the child well; that a warm affection has sprung up between him and themselves; that petitioner practically abandoned her child when she consented that the order of adoption might be made; and asks permission to prove that respondents are in every sense more worthy to have the custody of the child than the petitioner is. But there can be no estoppel in such a case, and the fitness, relatively, of the respective parties to care for the child is not a proper subject of inquiry in this proceeding. It is conceded that both parties are competent and fit persons to care for the child.

It is doubtless true, as claimed by respondents, that a parent is not entitled to the custody of a child who is old enough to work and care for himself, after consenting to his emancipation; but there is no basis for any such claim in this case. The minor is a young child incapable of caring for himself, and there is no pretense that the respondents have any authority over him other than such as is conferred by the order referred to.

It is ordered that the respondents, John D. Reulein and Katie Reulein, forthwith restore to the petitioner herein the care, custody, and control of said Charles Henry Clark.

DE HAVEN, J., HARRISON, J., SHARPSTEIN, J., MCFARLAND, J., GAROUTTE, J., and BEATTY, C. J., concurred.

[No. 13491. Department One.—February 10, 1891.]

JOHN F. CORKER, APPELLANT, *v.* AURELIA J. CORKER, RESPONDENT.

WILL—REVOCATION—HUSBAND AND WIFE—"MARRIAGE CONTRACT"—SETTLEMENT UPON SEPARATION—CONSTRUCTION OF CODE.—The term "marriage contract," as used in section 1299 of the Civil Code, concerning the revocation of a will by marriage of the testator, unless provision is made for the wife by marriage contract, etc., refers to and designates only such a contract or settlement between husband and wife as expressly purports in its terms to be a marriage contract, and to make provision for the wife in lieu of a testamentary provision for her, and does not include a post-nuptial agreement which merely purports to settle property rights between them in view of a separation.

ID.—CONTEST OF WILL—BURDEN OF PROOF.—When an antenuptial will is offered for probate, the surviving wife need only show the subsequent marriage, in order to defeat the probate; and the burden is then cast upon the proponent of the will, if he relies upon a marriage contract to prevent a revocation of the will, to prove the contract and show by its terms that it purports to make provision for the wife, and that such provision was intended to take the place of a testamentary provision for her.

ID.—EVIDENCE—MARRIAGE CONTRACT—INTENTION OF PARTIES.—Upon the contest of an antenuptial will by a surviving wife, no evidence can be adduced by the proponent of the will respecting what is claimed to be a marriage contract, other than the instrument itself, with proof of its execution if denied; and if the instrument does not purport upon its face to be a marriage contract within the meaning of the code, the court cannot receive any other evidence that such was the intention of the parties.

ID.—JURISDICTION OF PROBATE COURT.—Where an antenuptial will is shown to have been revoked by marriage, and no marriage contract is proved, the power of the probate court is limited to denying probate to the will, and determing who has a right to administer upon the estate; and it has no jurisdiction to inquire into any facts affecting the consideraiton, validity, or operation of a deed of separation between the testator and his wife.

APPEAL—IMMATERIAL FINDINGS—REVIEW OF EVIDENCE.—Where the court makes immaterial findings, it will not be inquired upon appeal whether the evidence is or is not sufficient to justify them; but the judgment will be affirmed, if there is sufficient evidence to sustain the material findings which support the judgment.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Smith & Northrop, for Appellant.

E. Baxter, and *Wells, Guthrie & Lee,* for Respondent.

HARRISON, J.—John R. Corker died in the county of Los Angeles September 12, 1889, leaving a writing purporting to be his last will, which was executed December 12, 1883; and on September 18, 1889, John F. Corker, who was named therein as executor, presented the same to the superior court of said county, together with his petition for its probate, and the issuance to him of letters testamentary thereon. To this petition the respondent, Aurelia J. Corker, filed written opposition, alleging that the said will had been revoked by reason of the marriage of the decedent to her, subsequent to its execution, and that no provision had been made for her, either in the will or by marriage contract. To this opposition the petitioner answered, alleging that after such marriage, and prior to the 9th of October, 1888, the decedent and contestant mutually agreed to separate and live apart, and "in pursuance of said agreement, the said John R. Corker and Aurelia J. Corker, on said ninth day of October, 1888 (entered into a marriage contract or agreement, in writing," under their hands and seals, which was duly acknowledged and recorded in the office of the county recorder of Los Angeles County; and that in consideration of the covenants in said marriage contract contained, "and as settlement and division of all their property rights, the said John R. Corker, on said ninth day of October, 1888, executed to Aurelia a deed "for certain real estate in Los Angeles County (describing the same), of which she thereupon took the possession, and that they then separated, and never after resumed marriage relations."

The following is the instrument referred to in his answer as a marriage contract or agreement:—

"It is agreed by and between Aurelia J. Corker and John R. Corker, husband and wife, of Los Angeles city

and county, state of California, as follows: "The said Aurelia J. Corker, in consideration of the said John R. Corker conveying to her, by good and sufficient deed this day executed contemporaneous herewith, the lands therein described, does hereby release and absolve him, the said John R. Corker, from in any manner contributing to her support, as his wife or otherwise, during their and each of their natural lives; that she releases and conveys to him all right, claim, or interest that she may have in or to all community property which has been or shall hereafter be acquired by her said husband, all right or claim to alimony or attorney's fees, costs or support, in any manner, during litigation or otherwise; and for the same consideration (in case of proceeding for the dissolution of the marriage between them is instituted by either party hereto) is hereby released and the said John R. Corker is absolved and discharged therefrom; and for the same consideration she releases all right, claim, or interest that she may have by law or otherwise in or to any property, real or personal, that he may have at the time of his death, or to which he may then be entitled, and all right, claim, and interest in or to his estate after he is dead.

"In consideration of the foregoing, the said John R. Corker has conveyed, and does hereby again convey, sell, and assign and set over to the said Aurelia J. Corker, as her own separate property, the lands and premises described in said deed of even date herewith, to have, hold, and convey the same, without let or hindrance from him, collect, receive, have, and enjoy the rents and profits therefrom, and discharges, releases, and absolves her and her property now or hereafter acquired by her from any, all, and every right, claim, or interest which he may have therein because the same being in law community property.

"And it is further mutually agreed between the parties hereto that they will each support and maintain

themselves, sell, convey, purchase, mortgage, and do all business regardless of the other, the same as if they were unmarried, the intention being to hereby settle, now and forever, all property rights and interests, and relieve each other of all obligations growing out of or imposed by their marital relations, as far as they can under the law, and they hereby agree that they will immediately separate and live apart from each other. As there are no children born of said marriage, and none have been adopted by them, there are none to be provided for by the parties hereto.

"In witness whereof, the parties to this agreement, have hereunto set their hands and seals this ninth day of October, 1888. "AURELIA J. CORKER. [SEAL.]

"JOHN R. CORKER. [SEAL.]"

At the hearing upon these issues, the contestant, for the purpose of defeating the effect of the instrument of October 9, 1888, offered evidence to show that the property conveyed to her in consideration of its execution was her separate property, and that consequently the agreement made no "provision" for her, and was without consideration.

The court, in its decision, took this view of the transaction, and found that the property so conveyed to her had, for a long time prior thereto, been her separate property; that there was no other consideration for the execution of the agreement; that the agreement itself was not fair and reasonable in its terms; that the release therein by the wife was not founded upon sufficient consideration; and that no provision had been made for her by the decedent, either by marriage contract or in the will, and thereupon denied probate to the will. A motion for a new trial was made by the proponent, upon the ground that the evidence was insufficient to justify the findings of the court that the property so conveyed to the wife was her separate property, or that the agreement of October 9, 1888, was without any other con-

sideration, or was not fair and reasonable in its terms, and, also, its finding that no provision had been made for her by marriage contract. The motion for a new trial was denied, and from this order the proponent has appealed to this court.

Section 1299 of the Civil Code is as follows: "If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received."

The term "marriage contract," as found in this section, is not defined in the code. The section itself is nearly identical with section 12 of the act concerning wills, passed April 10, 1850. At that time the legislature had before it the bill defining the rights of husband and wife, which became a statute April 17, 1850 (Stats. 1850, p. 254), and which contained a chapter headed "Marriage Contracts." An examination of the sections in that chapter will show that the term, as used therein, refers entirely to antenuptial contracts; and it is fairly presumable that the "marriage contract" referred to in section 12 of the act concerning wills (now section 1299 of the Civil Code) is the one referred to in the act of April 17, 1850, defining the rights of husband and wife. When the Civil Code was adopted, this term in the chapter on "Husband and Wife" was changed to "marriage settlement" and "contract for marriage settlement" (Civ. Code, secs. 177–181); and in consideration of the provisions of section 5 of the Civil Code, we must presume that the "marriage settlement" found in these sections is the same as the "marriage contract" found in the act of April 17, 1850, and consequently the same as the "marriage contract" referred to in section 1299 of the Civil Code.

Stewart, in his treatise on Marriage and Divorce, section 32, says: "Contracts or conveyances in contemplation of marriage, whereby property is promised to or settled on either or both of the parties, by either or both of the parties, or by a third party, and contracts whereby either or each of the parties releases or modifies, or agrees to release or modify, his or her property rights called marriage settlements or contracts." And in the same section he also says: "Marriage settlements made after marriage, unless in pursuance of antenuptial articles or agreements, are simply contracts between husband and wife."

It is unnecessary, however, to decide in this case whether the marriage contract referred to in section 1299 is limited to antenuptial contracts, or whether a post-nuptial agreement between husband and wife may be so framed as to constitute such a marriage contract, inasmuch as the instrument here is a post-nuptial agreement, which does not in terms purport to be a marriage contract.

Section 1299 unequivocally declares that, except in the instances therein specified, "if, after making a will, the testator marries, and the wife survives the testator, the will is revoked." When the will is offered for probate, the surviving wife, in order to defeat its probate, need only show that she was married to the testator subsequent to its execution. The burden is then cast upon the proponent to show the existence of one of the conditions which except it from this rule. If the wife is not mentioned in the will, he must show that "provision has been made for her" by "marriage contract." And in order to emphasize the rule that the instrument itself is the only mode of proof, the section further declares: "And no other evidence to rebut the presumption of revocation must be received."

The plain meaning of this clause is, that unless the

instrument shows upon its face that it is a "marriage contract" within the meaning of the section, and that by it "provision" has been made for the wife, and that such provision was intended to take the place of testamentary provision for her, the will is revoked. The wife is not called upon to introduce any further proof, and the proponent is limited in his proof to the marriage contract itself. Nor can the court receive any evidence for the purpose of showing the intention of the parties to the instrument, or their relative conditions of wealth at the time it was executed, or the effect which will result from its enforcement. If the instrument is a "marriage contract," and purports to make "provision" for the wife, the court cannot inquire into the character or extent or reasonableness of such "provision" any more than it can in other contracts between parties who are *sui juris*. If the parties are themselves satisfied with the "provision," it is not for the court to substitute its judgment for theirs as to its sufficiency. So long as the execution of the contract is not impeached, it is as binding upon the parties as would be any other contract.

If the instrument does not on its face purport to make provision for the wife in lieu of testamentary provision, the court cannot receive evidence of any character for the purpose of showing that such was the intention of the parties. The provision of the statute forbidding any other evidence than the contract itself is peculiarly appropriate to all post-nuptial agreements. As the husband and wife can enter into any engagement or transaction with each other respecting property which either might if unmarried (Civ. Code, sec. 158), such an agreement made by them ought not to receive a construction that does not appear upon its face to have been its object, or which will operate a different result from that which is fairly deducible from its terms. If the husband and wife have, each of them, separate property, and they choose to deal with each other respecting it,

either by way of exchange or purchase and sale, such dealing should not be made the pretext of asserting some right which does not appear from the terms of the instrument to have been in their minds. If the husband, during the marriage, makes to his wife a conveyance of certain property, such conveyance ought to be regarded as a gift rather than a "provision" for her which would prevent his antenuptial will from being revoked by his marriage.

The instrument executed between Corker and his wife partakes more of the nature of a deed of separation than of a marriage contract. It does not purport to make any "provision" for the wife, nor is there anything in its terms that indicates that either of the parties had in mind the subject of a will, or that the instrument was executed in lieu of making testamentary provision for her. It refers to another instrument executed to her by her husband, in consideration of which she releases him from certain marital obligations. The instrument itself does not contain any of the elements of a "marriage contract."

As soon as this instrument was presented to the court, and the court saw from an inspection of it that it was not a marriage contract, its power under the proceedings before it was limited to denying probate to the will. After it had been shown that there was no marriage contract in which provision had been made for the wife, the court was only required to determine the person who had the right to administer upon the estate. Whether rights of property passed under the contract, or whether it could be enforced, or whether the widow has any right in the estate of her deceased husband, are questions that may arise when distribution of the estate shall be sought, but could not then be investigated. Sitting at that time merely as a court of probate, it had no jurisdiction to inquire into the sufficiency of the consideration for which the deed to the wife was executed, or for the re-

lease then executed by her to her husband, or whether the property described in the deed to her was at the time of its execution her separate property, or whether the contract itself was fair or reasonable. Its findings and determination upon these subjects were without authority, and binding upon no one. These questions could be presented and determined only in a tribunal having jurisdiction to inquire into them, and where the parties who would be affected thereby would have an opportunity to be heard.

The court seems to have reached this conclusion, since in its judgment it merely declared that the will was revoked, and therefore denied it probate.

Whether the evidence before the court was sufficient to justify its findings upon the other propositions is immaterial. If there was sufficient evidence to justify its findings of the ultimate fact, that no provision had been made for the wife by any marriage contract, that decision or finding is not impaired by the fact that there was not sufficient evidence to justify the immaterial findings which it made; and its order denying a new trial was correct, and should be affirmed.

GAROUTTE, J., and PATERSON, J., concurred.

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AGENCY.

1. PRINCIPAL AND AGENT—OSTENSIBLE AUTHORITY.—To make a case of ostensible authority, the act giving color of authority to the supposed agent must be known to the person who dealt with him, and must induce a belief in the mind of such person that the authority exists. If he does not know of any facts giving color of authority to the supposed agent, but relies wholly upon the statements of the latter as to the existence of his authority, he cannot recover, although facts existed which, had he known them, might have justified belief in the existence of the authority.—*Harris* v. *San Diego Flume Co.*, 526.
2. BURDEN OF PROOF.—The party maintaining that an ostensible authority existed must prove that he knew of the facts giving color of authority to the supposed agent. A mere surmise that he knew them is not sufficient.—*Id.*
3. PRINCIPAL AND AGENT—IMPLIED AUTHORITY—BURDEN OF PROOF. —While an agent has implied authority to do everything necessary, or proper and usual, in the ordinary course of business, for effecting the purpose of his agency, the party maintaining the existence of the agency must make it appear that the thing done was necessary, or proper and usual, etc. —*Id.*
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the benefit of the bargain, he is bound by the terms made.—*Brock* v. *Pearson*, 581.

7. BROKER'S COMMISSIONS ON SALE OF REAL ESTATE—ASSUMPSIT—PAROL CONTRACT—QUANTUM MERUIT—STATUTE OF FRAUDS.—To entitle a broker to recover commissions due for the sale of real estate, his contract therefor must be in writing, and no recovery can be had upon a verbal contract or on a *quantum meruit*.—*McPhail* v. *Buell*, 115.

8. CONDITIONAL CONTRACT FOR COMMISSIONS—FAILURE OF CONDITION.—Under an agreement by a vendor to pay a broker a commission for selling land when the vendees paid a specified sum on account of the price, and executed their notes and a mortgage for the balance, no recovery can be had for the agreed commission, if the purchasers merely executed their notes and mortgage to the vendor, but never paid the sum required, and on account of their failure to make such payment the vendor was compelled to take back the property.—*Id.*

9. COMMISSIONS OF REAL ESTATE AGENTS—REPUDIATION OF CONTRACT BY VENDOR.—Real estate agents may recover from their principal the commissions agreed upon for a sale secured by them, if the proposed contract of sale was not beyond their authority, though the vendor refuses absolutely to consummate the purchase or to negotiate with reference to it.—*Fiske* v. *Soule*, 313.

10. SALE WITHIN AUTHORITY—ALTERNATIVE CONTRACT—CROPS.—Where the contract by the proposed vendor with the real estate agents authorizes them to sell at a certain price per acre without crops, or at a certain larger price per acre with crops, a contract of sale for a gross sum which yields per acre more than the highest amount required is not beyond the authority conferred, though it does not specify whether the sale is with or without crops.—*Id.*

11. CONSTRUCTION OF CONTRACT—ORAL AGREEMENT—MISTAKE.—A written contract for the sale of land for a gross sum, which does not except the growing crops, binds the vendor to convey the land with the crops.—*Id.*

12. TENDER—DEMAND OF DEED—WAIVER OF OBJECTION.—The fact that an ordinary grant deed without reservation of the crops was presented by the purchaser for execution by the vendor when the purchase-money was tendered, and that both contract and deed were not in proper form to express the real agreement understood between all the parties, to the effect that the sale was not to include the crops, cannot be offered by the vendor as an excuse for totally repudiating the contract, or by way of defense to an action by the real estate agents to recover the amount of commissions agreed upon in case of a sale without crops, it appearing that the contract and deed were not objected to on that ground, or considered as including the crops.—*Id.*

13. BROKER'S COMMISSION—PROCURING PURCHASER.—It is immaterial whether the power conferred upon real estate agents is to sell or merely to secure a purchaser, so far as their right to recover the agreed commission is concerned, if they comply with their part of the contract in procuring a purchaser, to whom the vendor refuses to convey.—*Id.*

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14. PLEADING—CONTRACT IN HÆC VERBA.—Where the contract with the real estate agents is set out *in hæc verba*, and made part of their complaint, it entitles them to recover whatever is authorized by its terms and by the facts proved, and it is immaterial that the complaint construes and treats it as a power to sell, conceding that it is not such, and that the agents are only entitled to recover as mere brokers.—*Id.*

15. AUTHORITY OF AGENT — CONTRACT AGAINST ENCUMBRANCES—WARRANTY—DEED OF GRANT.—A contract by the real estate agent that the vendor shall convey the land free of all encumbrances does not require him to convey by general warranty against all encumbrances, and if the deed demanded by the purchaser is an ordinary grant deed, the form of which is not objected to by the vendor, and it does not appear that any encumbrances existed, it cannot be objected to the recovery of commissions that a contract to convey by general warranty was not within the power conferred.—*Id.*

16. MUTUALITY OF CONTRACT—TENDER.—It is no defense to recovery of the agreed commission that the contract was not mutual, and that the purchaser might have forfeited the cash payment, if the whole purchase-money was tendered to the vendor and a deed demanded before the commission was demanded.—*Id.*

17. TERMS OF PAYMENT.—A contract between a vendor and a real estate agent, providing that the terms of payment are to be as buyer and seller may agree, does not impose upon the agents the duty of selling for cash, even if it be construed as reserving to the vendor the right to agree upon the terms in person; and there can be no reasonable objection to the terms of payment as a defense to the recovery of commissions, if when cash was tendered by the purchaser no objection was made on account of the terms.—*Id.*

18. PAYMENT OF PURCHASE-MONEY—REFUSAL TO ACCEPT TENDER.—When the vendor has refused to accept the tender of the purchase-money, and repudiated the contract made by his real estate agents with the purchaser, he cannot defend against the payment of commissions on the ground that the purchase-money was not paid.—*Id.*

19.—WANT OF TITLE IN VENDOR.—Where a vendor gives to real estate agents the property of his wife to sell as his property, and so describes it in the contract and they procure a purchaser without knowledge that the title was not in the vendor, his want of title cannot affect their right to recover their commissions from him.—*Id.*

20. REAL ESTATE AGENT—CONTRACT FOR COMPENSATION—RESERVOIR SITE—POSSESSORY RIGHT—AFTER-ACQUIRED TITLE—SALE BY PRINCIPAL.—A written contract to pay to an agent for the sale of a reservoir dam site a certain share of the purchase price, whether the sale should be effected by the agent or by the principal, is not defeated or affected by the fact that the principal had only possessory title to the site at the date of the contract, and thereafter procured the legal title thereto, and sold it as land.—*Campbell* v. *Thomas*, 428.

AMENDMENT. See LIS PENDENS.

APPEAL

1. DISMISSAL—DECREE OF DISTRIBUTION—SATISFACTION OF JUDGMENT.—When a judgment has been satisfied it has passed beyond review; and an appeal from a decree of distribution will be dismissed, where it appears that the appellants had received payment in full of the distributive shares allotted to them by the decree.—*Estate of Baby*, 200.
2. JUDGMENT—PAYMENT—FINAL DISCHARGE.—Payment of a judgment produces a permanent and irrevocable discharge; after which the judgment cannot be restored by any subsequent agreement, nor kept on foot to cover new and distinct engagements.—*Id.*
3. NOTICE—JOINDER OF PARTIES.—An appeal from a judgment, and from an order denying a new trial, may be taken by one notice, although all of the parties to the former fail to appeal from the latter; and a notice stating who are appellants and what they respectively appeal from is sufficient.—*Winter* v. *McMillan*, 256.
4. DOUBLE APPEAL—UNDERTAKINGS—CLERK'S CERTIFICATE—DISMISSAL.—A motion to dismiss such appeals on the ground that but one undertaking was filed, instead of two, will be denied, where there is nothing to contradict the clerk's certificate that "sufficient undertakings on appeal in due form were properly filed."—*Id.*
5. DOUBLE APPEAL—STIPULATION IN TRANSCRIPT—STATEMENT ON MOTION FOR NEW TRIAL—AUTHENTICATION.—Where a double appeal is taken by one notice from a judgment, and an order denying a new trial, and the transcript contains a stipulation that "the appeal herein may be heard" on the record on appeal in the transcript, the statement upon motion for new trial may be looked into on the appeal from the order denying a new trial, and it cannot be objected that it is not identified as having been used upon the hearing of the motion.—*Moore* v. *Long Beach Development Co.*, 483.
6. REVIEW OF CONFLICTING EVIDENCE.—When the evidence is conflicting, the finding of the court below will not be disturbed.—*Duff* v. *Duff*, 104.
7. REVIEW OF ERRORS—LAW OF CASE—CORRECT RESULT.—Where a cause has been twice tried, with the same result, and the main questions have become settled as the law of the case by a decision rendered upon a former appeal, and it appears, from the record, that the last trial was full and fair, that a correct result was reached in accordance with the law as decided upon the first appeal, and the evidence is conflicting, the judgment will be affirmed, without a detailed review of errors assigned which could not have affected the result.—*Id.*
8. REVIEW OF EVIDENCE — CREDIBILITY OF WITNESSES — FINDING RENDERED IMMATERIAL.—The findings of the court below will not be disturbed upon appeal, when there is evidence to support them, and nothing appears in the record to show that the court did not justly estimate the credibility of the witnesses; nor will a particular finding be disturbed, if other findings, justified by the evidence, render the issue immaterial.—*Clarey* v. *Lord*, 413.
9. REVIEW OF CONFLICTING EVIDENCE.—Where there is a plain conflict of evidence upon an issue material to the plaintiff's recovery, and the questions of law are properly submitted

APPEAL (Continued).

to the jury by correct instructions, a verdict and judgment in favor of the defendants will not be disturbed upon appeal.—*Lynch* v. *Welby*, 441.

10. IMMATERIAL FINDINGS — REVIEW OF EVIDENCE.—Where the court makes immaterial findings, it will not be inquired upon appeal whether the evidence is or is not sufficient to justify them; but the judgment will be affirmed, if there is sufficient evidence to sustain the material findings which support the judgment.—*Corker* v. *Corker*, 645.

11. REVIEW OF CONFLICTING EVIDENCE.—Where the evidence is conflicting the decision of the court below on a question of fact will not be disturbed.—*Campe* v. *Meierdiercks*.

12. REVIEW—ERROR WITHOUT PREJUDICE.—Where the record shows that the appellant is not entitled to recover in any event, error in rulings of the court upon the admission of evidence cannot entitle him to a reversal of the judgment.—*McPhail* v. *Buell*, 115.

13. NONSUIT—BILL OF EXCEPTIONS—SPECIFICATIONS OF ERROR.—On an appeal from a judgment of nonsuit, the ruling of the court in granting the nonsuit cannot be reviewed unless the bill of exceptions assigns or specifies the ruling of the court as error.—*Miller* v. *Wade*, 410.

14. REVIEW OF EVIDENCE — TIME FOR APPEAL — CONSTRUCTION OF CODE.—The ruling on a motion for a nonsuit is a "decision," within the meaning of section 939 of the Code of Civil Procedure, and as the whole question depends upon the sufficiency of the evidence to sustain the decision of the trial court upon the motion, the appeal must be taken within sixty days, to be available for a review of the ruling.—*Id.*

15. REVIEW OF JUDGMENT OF NONSUIT — GROUNDS OF MOTION—WAIVER.—Where a nonsuit is granted, the decision of the trial court will be upheld, if the ruling can be justified on any ground, whether made a ground of the motion or not and the fact that the record does not show the grounds upon which the motion was made, or that any grounds were assigned, will not justify a reversal of the judgment of nonsuit.—*Id.*

16. WAIVER OF GROUNDS OF MOTION.—An appellant whose motion for nonsuit is denied must show that he pointed out to the court below the grounds of his motion, and any ground not there urged is waived; but this rule can have no application where the decision is in favor of the moving party.—*Id.*

17. DISMISSAL—FAILURE TO FILE TRANSCRIPT IN TIME—RULE OF SUPREME COURT.—Rule 3 of the supreme court, providing that if the transcript is on file when notice is given of a motion to dismiss the appeal for failure to file the transcript in time, that shall be a sufficient answer to the motion, will not preclude the dismissal of an appeal, where the notice of motion is given before the filing of the transcript, although the transcript is filed a few hours later on the same day.—*Hoyt* v. *San Francisco and North Pacific R. R. Co.*, 610.

18. PRIORITY IN TIME—FRACTIONS OF DAY.—Although in some cases courts will not take cognizance of fractions of a day, to determine which of two acts was first in point of time, yet the rule is necessarily departed from when the question whether one legal right shall have priority over another de-

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pends upon the order of events occurring upon the same day. —*Id.*

19. DISMISSAL — FAILURE TO FILE TRANSCRIPT — SETTLEMENT OF STATEMENT.—An appeal from the judgment will be dismissed for failure to file the transcript within the time limited therefor, notwithstanding a statement on motion for new trial which appellant intends to use on the appeal remains unsettled, if it appears that the judge has properly refused to settle the statement, and that there can be no statement on appeal.—*Coffey* v. *Grand Council*, 370.
20. DISMISSAL—FAILURE TO FILE UNDERTAKING.—Where an undertaking on appeal is not filed or waived within the time prescribed by law, the appeal is ineffectual for any purpose, and will be dismissed.—*Perkins* v. *Cooper*, 241.
21. SUBSEQUENT WAIVER OF UNDERTAKING—STIPULATION IN TRANSCRIPT.—The filing of an undertaking cannot be waived by a stipulation made after the right of appeal has been lost; and a stipulation to the correctness of the transcript, stating that an undertaking on appeal was duly executed and filed, if proved and conceded to be untrue, and made without knowledge of the facts, is not binding, and does not constitute a valid waiver of the undertaking, there being no appeal pending in this court when the stipulation was made. —*Id.*
22. REHEARING — PRACTICE.—A rehearing in the supreme court will not be granted in order to consider points not made in the argument upon which the case was originally submitted.—*Kellogg* v. *Cochran*, 192.
23. FINDINGS—SUPPORT OF JUDGMENT—MODIFICATION—REVERSAL.—Upon appeal, where the findings as they stand would not support a judgment for the appellant, and the appellant is entitled to a reversal of the judgment, the judgment cannot be modified, in the appellate court, so as to give the appellant the relief to which he is entitled, as the appellate court cannot make findings for the court below, but can only reverse the judgment.—*Benson* v. *Shotwell*, 49.

See CLAIM AND DELIVERY, 4, 6; ESTATES OF DECEASED PERSONS, 10, 11; FRAUD, 4, 7; NEW TRIAL, 2.

ASSESSMENT. See STREET ASSESSMENT; TAXATION.

ASSIGNMENT.

1. DEED TO LAND TO WHICH GRANTOR HAS NO TITLE, BUT ONLY EXECUTORY CONTRACT OF PURCHASE.—A deed to a portion of land for which the grantor holds only an executory contract of purchase operates as an assignment of a proportionate interest in the contract.—*Brock* v. *Pearson*, 581.
2. EXTINCTION OF OBLIGATION—DESTRUCTION OF DOCUMENT—INTENT.—The destruction of a document which operates as an assignment of a portion of a contract of purchase of land does not extinguish the assignee's right, unless the destruction was with the intention to extinguish such right.—*Id.*
3. EVIDENCE OF INTENT.—Upon the question of the intent with which a document was destroyed, the acts of the agent who

ASSIGNMENT (Continued).

induced the other party to consent to such destruction are material, and a substituted contract given by him is pertinent although he had no authority to sign it.—*Id.*

See BAILMENT, 5, 6; VENDOR'S LIEN, 3; WAREHOUSEMAN, 3–5.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. TRUSTS.—A deed of assignment for the benefit of creditors is controlled by the provisions of the Civil Code relative to trusts, and operates to divest the assignor of his entire interest and estate in the property assigned, and to vest the same in the assignees, subject to the rights of the assignor to a reconveyance of any residue remaining undisposed of after the creditors are satisfied, or to payment of the surplus proceeds of sales of the property.—*Wilhoit* v. *Cunningham*, 453.
2. RIGHTS OF INSOLVENT AND CREDITORS.—An insolvent may in good faith make an assignment for the benefit of creditors with or without their consent, and the creditors must either avail themselves of the assets without preference, or not at all.—*Id.*
3. EXECUTION SALE OF ASSIGNED PROPERTY—CLOUD ON TITLE—INJUNCTION.—A creditor whose claims were subsisting credits upon which action had been commenced at the time of the assignment, and who assented thereto, cannot sell any of the assigned property on execution, and such sale may be enjoined as casting a cloud upon the title of the assignees, though the judgments were obtained subsequent to the assignment.—*Id.*
4. ATTACHMENT—DISSOLUTION—INSOLVENCY—DISMISSAL.—An attachment levied within one month prior to the filing of a petition in insolvency by the debtor is dissolved by operation of law, and will not justify a sale under execution after dismissal of the insolvency proceedings, and after a subsequent assignment by the insolvent for the benefit of his creditors.—*Id.*

See PLEADING, 4.

ATTACHMENT. See ASSIGNMENT FOR BENEFIT OF CREDITORS, 4.

BAGGAGE. See INNKEEPERS, 1.

BAILMENT.

1. WAIVER OF LIEN—CONVERSION BY BAILEE.—If a bailee refuses, upon demand, to deliver the property to the bailor, without setting up any lien thereon, he waives his right to claim a lien after suit brought to recover the value of the property. —*Lehmann* v. *Schmidt*, 15.
2. CONTRACT FOR SALE OF WINE—CONVERSION BY FACTOR—REPUDIATION OF CONTRACT.—A factor who receives wine under an agreement to sell it for the owner, and when demand was made upon him fails to assert a lien thereon, and refuses to have anything further to do with the contract, or the sale of the wine, or to deliver or account for it, stating that it was so mixed up with his own wine that he could not make a statement of it, is guilty of a conversion of the wine, and

BAILMENT (Continued).

cannot, after suit brought for its value, set up a lien for advances and expenses, as such lien, if any he had, was waived by his action.—*Id.*

3. CONTRACT FOR NET PRICE—LOSS ASSUMED BY FACTOR.—Where it was stipulated in the agreement that the owner of the wine was to receive a certain price per gallon, net, for the wine, and the factor agreed to bear the expense of shipping and curing, the factor is not entitled to any allowance for sediment, or for the money expended for freight, labor, and materials.—*Id.*
4. EVIDENCE—VALUE—STIPULATED PRICE.—Evidence that the wine would have sold for more than the price stipulated in the contract, if it had been sold at once, taken in connection with the price stipulated in the agreement of sale, is sufficient to justify a finding that the wine was worth the stipulated price at the time of its conversion.—*Id.*
5. ASSIGNMENT—ACTION BY ASSIGNEE.—An assignee of all of the bailor's interest in the wine converted by the factor may maintain an action for its value, although the wine converted was only a portion of that consigned.—*Id.*
6. SPLITTING OF CAUSE OF ACTION.—The rule against the splitting up of a cause of action is inapplicable to such a case.—*Id.*
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See INNKEEPERS; WAREHOUSEMAN.

BANKS.

1. LIABILITY FOR NOTE COLLECTED—PAYMENT TO CASHIER.—A bank is not liable to the payee for money collected upon a note left in the hands of its cashier for collection in his individual capacity, and which it has collected at the cashier's private request, and placed to his individual credit, and paid out to him on his checks drawn against his account as a depositor with the bank.—*McLennan* v. *Bank of California*, 569.
2. EVIDENCE — BOOKS OF BANK — DEALINGS WITH CUSTOMERS—COUNTERCLAIM.—In an action by the payee of the note to recover the money collected by the bank, the books of the bank showing the original entries of transactions between itself and its customers are admissible in evidence for the bank, for the purpose of showing an alleged indebtedness of the plaintiff to the bank, set up by way of counterclaim.—*Id.*
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BANKS (Continued).

from the evidence that the payee of the note had neglected to make any inquiry of the bank respecting its collection, or made any demand for any part of the money collected for six years after the collection, and until after the death of the cashier, when a still larger indebtedness of the payee to the bank had become barred by limitation, and that the relations between the payee of the note and the cashier were of a most friendly, personal character, testimony of the payee that the deceased cashier had declared to him that the note had been collected by the bank for the payee and placed to the payee's credit will not be sufficient to disturb the findings in favor of the bank, if his testimony, resulting from want of recollection or otherwise, is self-contradictory, and in some of its statements inherently improbable.—*Id.*

See MUNICIPAL CORPORATIONS, 1–6.

BILL OF EXCEPTIONS.

1. EXCEPTIONS—PETITION TO SUPREME COURT—CONSTRUCTION OF CODE.—Section 652 of the Code of Civil Procedure, providing for a petition to the supreme court to prove an exception which the judge has refused to allow in accordance with the facts, has no application, except where the judge has refused to allow an exception which he had the power to allow.—*Vance* v. *Superior Court*, 390.
2. SETTLEMENT OF FACTS.—If an exception has been disallowed contrary to the facts, the party may prove to the supreme court that the exception was taken, and in connection therewith may prove sufficient surrounding facts to show the point of the exception; but if no exception has been disallowed, a petition will not lie to the supreme court merely to determine whether the judge has inserted or refused to insert a correct statement of the proceedings and evidence in the action.—*Id.*

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BOUNDARY.

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2. EVIDENCE—DISPUTED BOUNDARY—CALL OF PATENT—QUESTION FOR JURY.—In an action of ejectment, where a question of disputed boundary is involved, evidence tending to show the location of a certain house, which was one of the calls of a United States patent issued to the defendants, is admissible, the question whether the evidence is sufficient to prove such fact being for the jury to determine.—*Id.*
3. COUNTY BOUNDARY—STATUTORY CONSTRUCTION—REFERENCE TO MEXICAN GRANTS—SURVEY—PATENTS.—The acts organizing the counties of San Bernardino and San Diego, and fixing the common boundary between them with reference to the lines of certain Mexican grants, must be construed as intending to adopt a line that could thus be definitely fixed;

BOUNDARY (Continued).

and an official survey of the grants which had been theretofore made and recorded is proper evidence of the location of the boundary, though not finally approved as the basis of patents confirming the grants, in preference to a subsequent survey, upon which the patents were based.—*County of San Bernardino* v. *Reichert*, 287.

4. MANDAMUS TO SURVEYOR-GENERAL — QUESTION OF TITLE—INTENTION OF LEGISLATURE.—Even if the courts have jurisdiction to control the surveyor-general by *mandamus* in the matter of a survey of a county boundary, the proceeding does not involve any question of title to real property, or of the correct boundaries of land as between private claimants, although the act establishing the boundary may refer to private grants; but the sole question is as to the intention of the legislature in fixing the boundary at the time of adopting the line.—*Id.*
5. CHANGE IN BANKS OF RIVER—SURVEY—COURSES AND DISTANCES —WIDTH OF STREAM—FINDING AGAINST EVIDENCE.—Where adjoining tracts of land were separated by a river, and the patent to each tract was bounded by the bank of the river upon the side upon which the tract was situated, and the court below found that the river had so changed its channel that the location of the banks as they formerly existed could not be found or traced, if the evidence shows that the river varied in width at different points, a finding in favor of the correctness of a survey by courses and distances along the supposed original bank of the river as called for by defendant's patent, and laying off upon a map a line parallel thereto at a uniform distance therefrom as the boundary of plaintiff's tract, is not sustained by the evidence, and such erroneous finding is ground for reversal of a judgment in favor of plaintiff.—*Martin* v. *Cooper*, 97.

BROKER. See AGENCY.

CLAIM AND DELIVERY.

1. FORM OF VERDICT—DELIVERY OF PROPERTY REPLEVIED.—In an action of claim and delivery, it is not necessary that the verdict shall provide for any delivery of the property, if such could be had.—*Ryan* v. *Fitzgerald*, 345.
2. CONCLUSION OF LAW—JUDGMENT.—When the verdict finds that plaintiff has the right of possession, the right to a delivery, if it can be had, or if not, to the value of the property as found by the jury, in the alterative, is a conclusion of law, which the judgment must contain, but not the verdict.—*Id.*
3. DAMAGES—TAKING AND DETENTION—PRESUMPTION.—Damages may be claimed and recovered in the action for both taking and detention, and when the verdict is for a sum certain as damages, it will be presumed to cover both grounds, if both are alleged in the complaint.—*Id.*
4. UNCERTAINTY OF VERDICT—APPEAL—OBJECTION FOR FIRST TIME. —An objection to the form of a verdict upon the ground of uncertainty in the statement of damages must be taken in the court below, and cannot be urged on appeal for the first time.—*Id.*

CLAIM AND DELIVERY (Continued).

5. VERDICT AND JUDGMENT FOR PART OF PROPERTY—RES ADJUDICATA.—When the plaintiff obtains a verdict and judgment for only part of the property sued for, and the verdict and judgment are silent as to the remainder, it must be held that plaintiff was denied any further relief, and he is precluded from further litigation as to the remainder.—*Id.*
6. RETURN OF PROPERTY NOT RECOVERED—APPEAL—PRESUMPTION—MODIFICATION OF JUDGMENT.—If the defendant has asked for a return of the property replevied, and it does not appear that he has given proper bond and sureties for the return, it must be presumed that the whole of the property claimed has been delivered to the plaintiff; and if the plaintiff's verdict and judgment are limited to a recovery of part only of the property, and no relief is awarded to the defendant, the judgment will be modified, on appeal, so as to require the return of the residue to the defendant.—*Id.*

CLOUD ON TITLE. See ASSIGNMENT FOR BENEFIT OF CREDITORS, 3.

CONSTITUTIONAL LAW. See CRIMINAL LAW, 2, 3, 18–20; IRRIGATION DISTRICTS, 1–5; MUNICIPAL CORPORATIONS; PUBLIC OFFICERS, 9, 10.

CONTEMPT.

1. DISOBEDIENCE TO WRIT OF PROHIBITION—ACTION OF RECEIVER—NEGLECT OF JUDGE.—After service of an alternative writ of prohibition commanding a superior judge, and a receiver appointed by him, to desist from interfering with the possession of property or the conduct of business in the hands of strangers to the suit, claiming title thereto, if the receiver continues to interfere with their possession and the conduct of their business, and attempts to oust them therefrom, and the superior judge neglects his duty to see that the receiver obeys the writ, each is guilty of contempt in disobeying the alternative writ.—*Havemeyer* v. *Superior Court*, 267.
2. SCRAMBLING POSSESSION—VOID ORDER.—Where, prior to the service of the writ, the receiver has only acquired a mixed and scrambling possession of the property, and the order appointing him is void, any further attempts by him to take and hold possession cannot be justified under the plea that possession had been fully taken, and that nothing was done after service of the writ except to preserve the *status quo*.—*Id.*
3. JURISDICTION—GOOD FAITH—TECHNICAL CONTEMPT—NOMINAL FINE.—Where the acts of the receiver and of the judge depended for their validity upon the jurisdiction of the judge to appoint the receiver, and they were erroneously advised that the possession of the receiver was lawful and complete, and that he must maintain it, notwithstanding the service of the alternative writ of prohibition, and that the judge could not interfere with or control his acts, pending the hearing of the cause, and each of them acted in good faith upon such advice, and neither intended any disrespect of the court, such good faith, though it cannot wholly relieve them of the contempt of which they are technically guilty, will preclude their being punished otherwise than by a nominal fine.—*Id.*

CONTRACT. See BAILMENT; SALE; VENDOR AND PURCHASER.

CONVERSION. See BAILMENT, 2; PLEADING, 14.

CORPORATION.

1. LIABILITY OF STOCKHOLDERS—PLEADING.—The complaint in an action to enforce the liability of stockholders for the indebtedness of a corporation must state the proportion which the stock owned by the defendant at the time the debt sued for was incurred bears to the whole subscribed stock at that time, or facts from which such proportion may be deduced.—*Bidwell* v. *Babcock*, 29.
2. ACTION FOR SEVERAL DEBTS — PLEADING — DEMURRER — SUBSCRIBED STOCK.—A complaint in an action to enforce several debts of a corporation against a stockholder which states the number of shares owned by the defendant during the period in which the debts sued for were incurred, and that during that period a certain number of shares were subscribed for, issued to, and owned by various parties, without stating that that number was the whole number of shares of stock subscribed at the time each debt was contracted, or stating the proportion which the shares owned by the defendant bore to the whole subscribed stock at each of said times, is insufficient, and a demurrer thereto should be sustained.—*Id.*
3. SEVERAL COUNTS IN COMPLAINT—DEFECTIVE PLEADING.—A complaint containing several counts upon several debts of a corporation with which a stockholder is sought to be charged must state in each count the existence of the corporation, and the facts showing the defendant's proportionate share of liability for each debt, or must refer to the statement of these facts in the first count; and defects in such statement in subsequent counts cannot be supplied by statements in the first count, in the absence of reference to them.—*Id.*
4. TRUSTEE—MUNICIPAL CORPORATION—INTEREST — FRANCHISE.—When an application for a franchise was referred to a committee of two, and upon their favorable report the franchise was granted, the fact that one of the committee was a subscriber to the stock of the company for whose benefit the franchise was granted renders the franchise void.—*Finch* v. *R. & A. R'y Co.*, 597.
5. CORPORATION.—It makes no difference that the corporation for whose benefit the franchise was granted was not yet formed; it is sufficient that the franchise was granted to a committee of subscribers for the benefit of the corporation.—*Id.*

See LANDLORD AND TENANT, 7; MUNICIPAL CORPORATIONS.

COUNTERS. See BOUNDARY, 3, 4.

CRIMINAL LAW.

1. HABEAS CORPUS—JURISDICTION OF POLICE COURT—CONVICTIONS OF MISDEMEANOR—COMPLAINT—TIME OF OFFENSE.—The police court has jurisdiction to try and convict a defendant charged with misdemeanor, although the time of the commission of the offense is not set forth in the complaint.—*Ex parte Ah Sing*, 423.
2. CONSTITUTIONAL LAW — HOUSE OF CORRECTION IN SAN FRAN-

CRIMINAL LAW (Continued).

CISCO—LOCAL LEGISLATION—PUNISHMENT OF CRIME.—The act of 1878 providing for the sentencing of certain prisoners convicted of felonies or misdemeanors in the city and county of San Francisco to the house of correction in said city and county, in the discretion of the court, is not special or local, either for the punishment of crimes or misdemeanors, or for regulating the practice of the courts of justice, and is not in conflict with section 25, article 5, of the constitution.—*Ex parte Williams*, 78.

3. JURISDICTION OF SUPERIOR COURT OF SAN FRANCISCO.—The superior court of the city and county of San Francisco is the constitutional successor of the municipal criminal court of the city and county of San Francisco, as respects all cases of felony formerly committed to the jurisdiction of that court, and it is its province and right, as the successor of the municipal criminal court, to sentence to the house of correction persons convicted of felony in said city and county who are of the same class as might have been placed therein by the municipal criminal court under the act to establish the house of correction.—*Id.*

4. CONSTRUCTION OF STATUTE.—The power of the superior court to sentence a defendant convicted of felony in the city and county of San Francisco to the house of correction therein, under the terms of the act of 1878, is not affected by the act of 1885 "to provide for the commitment of persons convicted of crime to the house of correction," which relates only to minor offenses, punishable by imprisonment in the county jail, without regard to age.—*Id.*

5. AGE OF PRISONER CONVICTED OF FELONY—PRESUMPTION—HABEAS CORPUS.—Where the record is silent as to the age of a prisoner committed to the house of correction upon conviction of a felony, the court must be presumed to have discharged its duty in ascertaining the fact that the prisoner was under twenty-five years of age at the date of judgment; and whether the finding be evidenced by the record or by the presumption of law, its correctness can only be reviewed upon appeal under a bill of exceptions, and cannot be inquired into upon *habeas corpus*.—*Id.*

6. ASSAULT WITH DEADLY WEAPON—PRIOR CONVICTION OF FELONY—PLEADING—READING OF INFORMATION—CONSTRUCTION OF MINUTES OF TRIAL.—A statement in the minutes of the trial of a defendant accused of an assault with a deadly weapon, and of a prior conviction of a felony, who had pleaded not guilty to the former charge and guilty to the latter, that "the information is read and the plea of not guilty stated to the jury by the clerk," should be construed as a statement that the charge in the information as to the assault only was read, when it does not clearly appear that the whole information was read, and it appearing, from the record, that what was read was in the presence of the defendant, and not objected to, and that the charge as to the assault only was submitted to and passed on by the jury.—*People* v. *Douglass*, 281.

7. FORM OF VERDICT—GENERAL STATEMENT OF OFFENSE.—A verdict in general terms finding the defendant guilty of an assault with a deadly weapon, under an information charging

CRIMINAL LAW (Continued).

that the assault was made upon a person named, is in accordance with law, and free from uncertainty.—*Id.*

8. FORM OF JUDGMENT—GENERAL RECITAL OF CONVICTION.—The judgment is not rendered insufficient or uncertain by merely reciting that the defendant answered and confessed to a previous conviction of manslaughter, and was convicted in the court of the crime of assault with a deadly weapon, without further statement of particulars.—*Id.*

9. MISNOMER OF PERSON ASSAULTED.—Whether in the information the name of the person assaulted was written therein "Daniel Auseon" or "Daniel Anseon," was for the trial court to determine, and the trial court having directed the jury that the name written in the information was Daniel Auseon, this court will not revise the action of such court in so holding.—*Id.*

10. ASSAULT UPON BRAKEMAN OF RAILROAD TRAIN — TRESPASS—QUESTION OF FACT.—Where the assault was committed upon the brakeman of a railroad company in his efforts to get the defendant off the train, and there is evidence tending to show that the defendant was not a passenger on the train, but a trespasser thereon, it is a question of fact for the jury whether the defendant was a trespasser or a passenger. —*Id.*

11. PRESUMPTION—PASSENGER—TRESPASSER UPON TRAIN.—A person on a car used for carrying passengers is presumed to be a passenger, and rightfully there, but this presumption may be rebutted; and no presumption of law or fact arises where the person is found on a car not used for the accommodation of passengers, and it is for the jury to determine whether such person is a passenger or trespasser upon the train.—*Id.*

12. JUSTIFICATION OF ASSAULT.—A trespasser on a train is not justified in shooting a servant of the railroad company who attempts to put him off, when he can with safety get off and avoid the shooting.—*Id.*

13. PUNISHMENT OF OFFENSE — PREVIOUS CONVICTION OF MANSLAUGHTER.—An assault with a deadly weapon being punishable upon a first conviction by imprisonment in the state prison for a period of two years, it may be punished under section 266 of the Penal Code by imprisonment therein for any term not exceeding ten years, where there has been a prior conviction of manslaughter.—*Id.*

14. INFORMATION—DEMURRER.—A demurrer to an information is properly overruled when it would remain sufficient under the statute if the part excepted to should be stricken out.—*People* v. *Perez*, 122.

15. GRAND LARCENY—VERDICT.—Upon an information for grand larceny, a verdict of "guilty as charged" is a conviction of grand larceny.—*Id.*

16. ARRAIGNMENT FOR JUDGMENT—JUDGMENT—PUNISHMENT FOR GRAND LARCENY.—Where the judgment roll shows a full compliance with the requirements of section 1200 of the Penal Code at the time of arraignment for judgment, and the judgment, upon conviction for grand larceny committed in the city and county of San Francisco, is, that the defendant be punished for the crime of which he was charged and convicted, by imprisonment in the state prison of the state of

CRIMINAL LAW (Continued).

California at San Quentin for the term of nine years, the judgment is sufficient under the statute.—*Id.*

17. TRIAL BY JURY—COMMON LAW.—By the common law, the trial of all crimes is required to be by a jury selected from the vicinage or county where the crime is alleged to have been committed.—*People* v. *Powell*, 348.

18. CONSTITUTIONAL LAW—BILL OF RIGHTS.—Section 7 of the bill of rights, in the state constitution, providing that "the rights of trial by jury shall be secured to all, and remain inviolate," refers to the right as it existed at common law. —*Id.*

19. PENAL CODE—UNCONSTITUTIONAL PROVISION—CHANGE OF PLACE OF TRIAL—APPLICATION OF DISTRICT ATTORNEY.—Subdivision 2 of section 1033 of the Penal Code, authorizing a change of the place of trial of a criminal action to another county, upon application of the district attorney, without the consent of the defendant, where no jury can be obtained for the trial of the defendant in the county where the action is pending, is unconstitutional and void.—*Id.*

20. JURISDICTION—VENUE.—The superior court of another county than that in which the crime was committed has no jurisdiction to try the case, where the venue was changed to such county upon application of the district attorney without the consent of the defendant.—*Id.*

21. CONSTRUCTION OF PENAL CODE—CHANGE OF PLACE OF TRIAL—INSUFFICIENT APPLICATION.—If it be conceded that subdivision 2 of section 1033 of the Penal Code is valid, it must be strictly construed and strictly pursued; and an application on the part of the district attorney showing merely that a fair and impartial jury cannot be obtained therein, and not showing that all legal means had been exhausted to procure a jury, and that no jury can be obtained therein, is insufficient.—*Id.*

22. COMPETENCY OF JURORS—IMPARTIALITY.—A juror is not necessarily incompetent because he is not impartial; and proof that a fair and impartial jury cannot be obtained is not equivalent to proof that no jury can be obtained.—*Id.*

23. HOMICIDE—EVIDENCE—REBUTTAL—HABIT OF DECEASED—DECLARATIONS.—Upon trial of a charge of murder, evidence that the defendant believed that the deceased was armed at the time of the killing cannot be rebutted by evidence that the deceased was not in the habit of carrying arms, and had so stated on various occasions, and had refused to go armed on the morning of the homicide, the declarations of the deceased not appearing to have been communicated to the defendant.—*Id.*

24. CHARACTER OF DECEASED FOR PEACE AND QUIETNESS.—Evidence to sustain the character of the deceased for peace and quietness cannot be given by the prosecution unless it has been attacked by the defendant; nor can such character be proved by evidence that he was not in the habit of carrying arms, or of his refusal to do so.—*Id.*

25. DECLARATIONS OF DECEASED—QUARRELS—REBUTTAL.—Evidence that the deceased had said that he had quarreled with several persons is incompetent, and if given by the defendant, without objection, cannot be rebutted by proof that the deceased was not in the habit of going armed.—*Id.*

CRIMINAL LAW (Continued).

26. CONVERSATIONS OF WITNESS WITH THIRD PERSONS—STRIKING OUT EVIDENCE.—When a witness for the prosecution has testified to conversations with third persons, which the prosecution fails to connect with the defendant by proposed proof, a motion of the defendant to strike out such conversations should be sustained.—*Id.*
27. DECLARATIONS OF DEFENDANT—THREATS AGAINST WITNESS.—Evidence of a conversation of a witness with the defendant, relating to threats of the defendant toward the witness, on the supposition that he was the author of a newspaper article published by the deceased, is incompetent against the defendant, it not appearing that the conversation was communicated to the deceased.—*Id.*
28. SELF-DEFENSE—REASONABLE FEAR OF BODILY HARM—DANGEROUS CHARACTER OF DECEASED — WARNING OF DEFENDANT.—Where the defendant claims to have killed the deceased in self-defense, while acting with reasonable prudence, and under an honest belief that he was in imminent danger of death or of great bodily injury, it is competent for him to show that before the shooting he was informed that the deceased was a dangerous man, and such information need not have been brought home to the deceased; but it is not competent merely to prove that the defendant was warned to look out for the deceased.—*Id.*
29. ARGUMENT—PRIVATE COUNSEL—ASSISTANCE OF DISTRICT ATTORNEY—DISCRETION.—It is discretionary with the trial court to allow private counsel employed to assist the district attorney in the prosecution of a defendant charged with murder, and to open and close the argument to the jury, with the consent and acquiescence of the district attorney.—*Id.*
30. BURDEN OF PROOF—PREPONDERANCE OF EVIDENCE—REASONABLE DOUBT.—Proof of the homicide by the prosecution does not cast upon the defendant the burden of proving, by a preponderance of evidence, that the killing was justifiable or was only manslaughter, but it is sufficient if the evidence adduced by the defendant raises a reasonable doubt of his guilt.—*Id.*
31. HOMICIDE—EVIDENCE—DYING DECLARATION.—Upon the trial of a defendant charged with murder, the dying declaration of the deceased, in order to be admissible in evidence, need not show or state, in terms, that it was made under a sense of impending death, if there is sufficient evidence *aliunde* the written declaration to show that it was so made.—*People* v. *Bemmerly*, 117.
32. WRITTEN DECLARATION OF DECEASED—NOTES OF ORAL STATEMENT.—Where notes were taken of what the deceased said, and a statement written out therefrom, which was read to the declarant, sentence by sentence, and the accuracy of each sentence assented to by him, and then signed in the presence of witnesses, the statement becomes his dying declaration, although the written declaration contains some words that were not used by the declarant in his oral statement.—*Id.*
33. PRACTICE—CHALLENGE OF JUROR—ACTUAL BIAS—APPEAL—EXCEPTION.—The ruling of the trial court upon the challenge

CRIMINAL LAW (Continued).

of a juror for actual bias will not be reviewed on appeal, and its disallowance is not the subject of exception.—*Id.*

34. PEREMPTORY CHALLENGE.—It is not error to permit the prosecution to peremptorily challenge a juror after he has been sworn, where good reasons are shown therefor.—*Id.*
35. INSTRUCTION—REASONABLE DOUBT.—An instruction to the jury defining a reasonable doubt as "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself" is erroneous.—*Id.*
36. INDORSEMENT OF INSTRUCTIONS—REVIEW ON APPEAL.—In the absence of an indorsement showing whether a certain instruction was given, it will not be reviewed on appeal.—*Id.*

DAMAGES. See CLAIM AND DELIVERY, 3, 4; EVIDENCE; FRAUD, 16; INJUNCTION, 1, 3; MALICIOUS PROSECUTION, 1; NEGLIGENCE, 8, 9.

DEBTOR AND CREDITOR.

ORDER—VERBAL ACCEPTANCE—EVIDENCE.—A written order given by a debtor to his creditor for the amount of his indebtedness, addressed to a person indebted to the drawer in a like sum, and verbally accepted and partly paid by the drawee, is admissible in evidence, together with proof of the verbal acceptance, in an action by the payee to recover the remainder of the indebtedness from the drawee.—*Joyce* v. *Wing Yet Lung*, 424.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; INSOLVENCY.

DEDICATION.

1. DEDICATION OF LEVEE AND STREET — DESIGNATION UPON CITY MAP—EJECTMENT BY MUNICIPAL CORPORATION—FINDINGS—EVIDENCE—REVIEW UPON APPEAL.—In an action of ejectment brought by a city, where the court finds that the land sued for had been dedicated by the owners for the use of the public as a levee and street, and such finding is sustained by the evidence, a judgment in favor of the city is supported by such finding; and a subsequent finding that the land, by the direction of the owners, had, after such dedication, been so designated on the maps of the city, is immaterial, and may be excluded from consideration upon appeal, although not supported by the evidence.—*City of Napa* v. *Howland*, 84.
2. EVIDENCE—MAPS NOT MADE BY OWNER—WAIVER OF OBJECTION.—Where recorded maps produced upon the question of dedication are admitted subject to further proof that they were made and recorded by a real owner of the land, or for a limited purpose as explanatory diagrams, objection is waived if there is no motion to strike them out for want of further evidence, and no exception is taken to their admission, and they are referred to on the argument of the case by both parties in considering and discussing their effect as evidence on the question of dedication.—*Id.*
3. MAP MADE AT REQUEST OF OWNER.—A map made and recorded at request of a former owner of the premises is admissible

DEDICATION (Continued).

as evidence against his grantees upon the question of dedication by the former owner.—*Id.*

4. DEDICATION FOR PUBLIC "LANDING"—"LEVEE."—Evidence showing a dedication of land for a public landing will support a finding of a dedication as a public levee and for street purposes. The word "levee," as applied to portions of the public highways bordering on navigable streams and sloughs in interior cities and towns, has the same meaning as landing. —*Id.*

5. DEDICATION BY MEXICAN GRANTEE—ESTOPPEL—AFTER-ACQUIRED TITLE.—If it be assumed that the owner of an unconfirmed Mexican grant had no title to the lands at the time he dedicated a levee and street to public use, he and his grantees are nevertheless estopped from denying the fact of dedication; and a title subsequently acquired by confirmation of the grant by the board of land commissioners and patent from the United States feeds the estoppel.—*Id.*

See MANDAMUS, 4; PUBLIC LANDS, 12, 13; STREETS AND HIGHWAYS, 5.

DEED. See ASSIGNMENT, 1.

DEMURRER. See PLEADING.

DESCRIPTION. See BOUNDARY.

DURESS. See TRUST, 4.

EASEMENT.

1. RIGHT OF WAY FOR IRRIGATING DITCH—CONTRACT OF SALE—LICENSE—REVOCATION.—Where the plaintiff and his assignor entered into a parol agreement with defendant, by the terms of which they were to receive a conveyance of a right of way for an irrigating ditch over defendant's land, and of one half of the water to be diverted thereby, the plaintiff and his assignor to survey and excavate the ditch and keep it in repair, and the ditch, when completed, to be used for the equal benefit of both the contracting parties for the purpose of irrigation, and the ditch was constructed and kept in repair by the plaintiff and his assignor, and used by both parties, the agreement is essentially one of purchase and sale, and the defendant will not be allowed to treat the transaction as a mere parol license which he may revoke after the work has been done and money expended by the other parties under the contract.—*Flickinger* v. *Shaw*, 126.

2. SPECIFIC PERFORMANCE — ORAL AGREEMENT FOR EASEMENT—PART PERFORMANCE—STATUTE OF FRAUDS.—Equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be an inadequate remedy; and where there has been such a part performance of an oral agreement for an easement upon land that it would be a sanction of fraud to refuse its specific performance, the statute of frauds does not prevent an enforcement of the agreement.—*Id.*

EASEMENT (Continued).

3. EXECUTED LICENSE—EXPENDITURE BY LICENSEE—REVOCATION—TRUST EX MALEFICIO.—An executed license may become an agreement for a valuable consideration, and where the revocation of the license would operate as a fraud upon the licensee, who has expended money and made improvements upon the faith of it, equity will hold the owner of the land as a trustee *ex maleficio* to prevent such revocation.—*Id.*
4. RIGHT OF WAY—EQUITABLE TITLE—INJUNCTION.—Where nothing remains to be done to complete such contract except the execution of a conveyance to the plaintiff of the right of way for the irrigating ditch, and of a proper proportion of the water diverted thereby, the plaintiff has a perfect equitable title in the ditch and water, which equity will protect by injunction, as readily and fully as it would protect the legal title.—*Id.*

EJECTMENT.

1. EVIDENCE OF POSSESSION.—To maintain an action of ejectment, the plaintiff must show that he was entitled to the possession of the demanded premises at the time he commenced the action.—*Sauer* v. *Meyer*, 34.
2. PARTIES—LANDLORD AND TENANT—ACTION AGAINST LANDLORD—DEMAND OF POSSESSION—ADMISSION.—Where the defendant in an action of ejectment, upon being served with a notice demanding possession of the premises, admitted that he held possession of the property, but refused to surrender it, it is not necessary that a tenant from month to month, to whom he had rented the property, be made a party defendant to the action.—*City of Napa* v. *Howland*, 84.

See JUDGMENT, 3; PLEADING, 10, 11.

ELECTION. See MUNICIPAL CORPORATIONS, 15.

EMINENT DOMAIN.

1. PROHIBITION—MUNICIPAL CORPORATIONS—RIGHT OF WAY FOR SEWER—FAILURE TO AGREE—AUTHORITY TO SUE.—A writ of prohibition will not lie to restrain the prosecution of an action by city authorities to condemn a right of way for a sewer, on account of the absence of an averment or proof that the city authorities were unable to agree with the defendant, or that the local board of the municipal corporation had expressly directed the institution of the proceeding.—*Bishop* v. *Superior Court*, 226.
2. JURISDICTION—QUESTION OF LAW—APPEAL.—Whether or not the failure to agree or to authorize the suit is a bar to the condemnation proceeding is not a question going to the jurisdiction of the superior court, but is a question of law to be determined by it in the course of the proceeding; and any error in such determination is subject to review upon appeal, and does not furnish ground for a writ of prohibition.—*Id.*
3. SUPERIOR COURT—JURISDICTION OF CONDEMNATION PROCEEDING—CONSTITUTIONAL LAW—SPECIAL CASES — CODE — MUNICIPAL GOVERNMENT ACT.—The superior court is a court of general jurisdiction, and derives its jurisdiction to entertain a pro-

EMINENT DOMAIN (Continued)

ceeding by a city or town to condemn private property for a right of way from the constitutional grant of jurisdiction over special cases not otherwise provided for, and from the provision of the code relative to special proceedings, and not from the municipal government act—*Id.*

4. CONSTRUCTION OF MUNICIPAL GOVERNMENT ACT—FAILURE TO AGREE—DIRECTION TO SUE.—The provisions of section 870 of the municipal government act do not affect the jurisdiction of the superior court to hear and determine all questions that may arise between the parties in a condemnation proceeding by a city or town, although a failure to agree, or to direct suit to be brought as therein provided, may affect the right of the municipality to maintain the action and to secure the relief demanded.—*Id.*

5. CONDEMNATION PROCEEDINGS—LIS PENDENS—LEASE AFTER SUIT BROUGHT—PARTIES—RES ADJUDICATA.—Under section 1246 of the Code of Civil Procedure, one claiming an interest in land under a written lease executed pending an action to condemn the land, is authorized to appear, plead, and defend his interest, though not named as a party to the proceedings; and where he fails to do so after he has notice of the proceeding, he is estopped by the judgment from claiming anything by virtue of his written lease, entered into subsequent to the filing of the *lis pendens*.—*Drinkhouse* v. *Spring Valley Water Works*, 253.

6. ACTION TO ENJOIN TAKING—EVIDENCE.—Such lessee cannot maintain an action to enjoin the taking of the property condemned pursuant to the judgment; and the judgment roll in the condemnation proceedings, and the notice of *lis pendens*, are admissible evidence against him in bar of such action.—*Id.*

See STREETS AND HIGHWAYS, 5.

EQUITY. See INJUNCTION; PRACTICE.

ESTATES OF DECEASED PERSONS.

1. TURNING OVER ASSETS TO CO-EXECUTOR—LIABILITY OF EXECUTOR—REASONABLE PRUDENCE.—An executor who has money of the estate in his hands, and turns it over to his co-executor, or who actively assists to put it into the hands of his co-executor, is liable for any misapplication of it by the latter, unless it appears that good reasons existed for turning it over, and that in allowing the co-executor to keep, control, and disburse it he acted in good faith, without notice of any purpose to misapply it, and with reasonable prudence and discretion.—*Estate of Osborn*, 1.

2. GOOD FAITH OF PARTIES—OMITTED DUTY—HONESTY OF CO-EXECUTOR.—The liability of an executor for misappropriation of assets turned over to his co-executor depends on the circumstances of each case; good faith alone will not save him from liability, if an omitted duty on his part has occasioned the loss, nor will bad faith on the part of the co-executor subject him to liability, if he has omitted no duty on his part, since he has a right to rely upon the honesty of his co-executor, whether he be rich or poor.—*Id.*

ESTATES OF DECEASED PERSONS (Continued).

3. NEGLECT OCCASIONING LOSS.—An executor or trustee is liable for the wrongful acts of a co-executor or co-trustee, to which he consented, or which by his negligence he enabled the latter to commit, and when he failed to use the means within his power to prevent.—*Id.*
4. DUTY OF EXECUTORS TO ACCOUNT—WASTE RESULTING FROM NEGLECT—JOINT AND SEVERAL LIABILITY.—It is the duty of executors to account within reasonable or statutory time, and a neglect to account which results in waste renders the executors jointly and severally liable, the same a in case of failure to collect debts before the statute of limitations has run against them.—*Id.*
5. EXECUTOR LEAVING STATE—INSOLVENCY OF CO-EXECUTOR—FINAL ACCOUNT AFTER STATUTORY TIME—LIABILITY FOR MISAPPROPRIATION. — An executor who upon departing from the state for an indefinite period left the money and business of the estate in the care of his co-executor, and thereafter took no part in its management, but joined in a final account with the co-executor long after the time allowed by statute for the filing of the account, is liable, upon the insolvency of the co-executor, for the funds appropriated by him to his own use.—*Id.*
6. SALE OF REALTY—PETITION OF CREDITOR OF EXECUTOR—NONSUIT.—Where a petition for the sale of the real estate of a decedent, presented by a creditor of the executor whose claim has been allowed by the court, states sufficient facts to justify the sale, and the petitioner introduces evidence tending to prove every material allegation of the petition, it is error to grant a nonsuit on motion of the devisees.—*Estate of Courts*, 480.
7. ALLOWANCE FOR SERVICES DURING ADMINISTRATION—PETITION OF CLAIMANT—NEGLECT OF EXECUTOR.—A claimant for services rendered to the estate during administration, whose claim has been allowed by the court as a proper expense of administration, may apply for a sale of the real estate to pay his claim, if the executor has not funds sufficient to pay it, and neglects to apply for the order of sale.—*Id.*
8. CONSTRUCTION OF CODE—CREDITORS OF EXECUTORS—EXPENSES OF ADMINISTRATION.—Sections 1536 and 1545 of the Code of Civil Procedure are intended to afford creditors of the executors as well as creditors of the decedent the means of securing payment of their claims against the estate, and contemplate expenses of administration which the executor neglects or refuses to pay.—*Id.*
9. UNPAID CLAIMS AGAINST EXECUTOR—SETTLEMENT OF ACCOUNT—JURISDICTION.—Claims against an executor for services rendered or materials furnished to the estate during administration need not be paid until they are allowed in the settlement of his account; but the court may determine, after notice to all persons interested, whether the estate is liable at all, and if so, in what amount.—*Id.*
10. SETTLEMENT OF EXECUTOR'S ACCOUNT—APPEALABLE ORDER.—An order settling the account of an executor is appealable.—*Id.*
11. CONCLUSIVENESS OF ALLOWANCE OF CLAIM—PETITION FOR SALE OF REALTY.—The allowance by the court of a claim for services rendered to an executor as part of the expenses of ad-

ESTATE OF DECEASED PERSONS (Continued).

ministration included in his account is conclusive against all parties interested, except those laboring under disability, if no appeal is taken from the order settling the account, and cannot be questioned by the devisees upon a petition for the sale of realty to pay the claim.—*Id.*

See PUBLIC LANDS, 9; WILLS.

ESTOPPEL. See DEDICATION, 5; PARENT AND CHILD, 7; PUBLIC LANDS, 9, 20.

EVIDENCE.

1. CONFLICT OF EVIDENCE.—The rule as to conflict of evidence applies to cases of contradictions in the testimony of a witness. The conflict is all the more fatal for being intestine.—*Brock* v. *Pearson*, 581.
8. OBJECTIONS TO EVIDENCE—WAIVER OF GROUNDS NOT SPECIFIED.—A party objecting to the admission of evidence must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not specified.—*Brumley* v. *Flint*, 471.
3. GENERAL OBJECTION—SPECIAL OBJECTION.—A general objection is sufficient if the evidence objected to is absolutely inadmissible for any purpose; but otherwise, to entitle the objection to notice, it must be distinctly specified.—*Id.*
4. DAMAGE BY CATTLE — OPINION EVIDENCE — QUALIFICATION OF WITNESS—APPEAL—OBJECTION FOR FIRST TIME.—In an action to recover damages for trespass of cattle, where a witness was asked to state what amount of damage, in his estimation, was done by the cattle, and the question was objected to as incompetent, irrelevant, and immaterial, as asking for a conclusion, and as not the proper way to prove damages, the point that the witness was not shown to possess the requisite knowledge to enable him to testify as to the damages is not raised by the objection, and will not be considered for the first time on appeal.—*Id.*
5. DAMAGE BY CATTLE—EXCESSIVE VERDICT—CONFLICTING EVIDENCE—SUBLEASE OF PREMISES TRESPASSED UPON.—Where the evidence as to the number of trespassing cattle and as to the damage done by them is conflicting, and the evidence on the part of the plaintiffs tended to show greater damage than was awarded to them, the verdict will not be set aside as excessive on account of the fact that the premises trespassed upon were afterward subleased for one half more rent than was paid for them by the lessee.—*Id.*
6. PRESS COPIES OF LETTERS.—Press copies of letters are the best evidence, next to the originals themselves; and where such copies are shown to exist, it is error to allow oral evidence as to their contents.—*Ford* v. *Cunningham*, 209.
7. ACTION AGAINST PARTNERSHIP—SALE TO INDIVIDUAL PARTNER—EVIDENCE—BOOKS OF ACCOUNT.—Where a partnership is sued for barley sold to one of the firm individually, the account-book of the copartnership, admitted to be a book containing original entries, and showing that there was no item of barley in the account of the defendants with the plaintiffs, is admissible in evidence, in connection with the testimony of

EVIDENCE (Continued).

one of the partners that the book showed the true state of accounts between the plaintiffs and the defendants, and that the items therein contained had been entered at the time of the several transactions therein mentioned.—*Id.*

8. CONTEST OF WILL—EVIDENCE—FACTS NOT OCCURRING AT TRIAL—ARGUMENT OF COUNSEL.—Upon a contest of a will, the issue as to the validity of the will must be determined solely upon the evidence introduced at the trial; and the court cannot properly consider any facts not occurring at the trial, and which were stated for the first time in the argument of counsel.—*Estate of Man Wo Chan*, 155.

9. NEW-TRIAL STATEMENT—AMENDMENTS—APPEAL—PRESUMPTION.—Where the judge who tried the contest of a will, and rendered judgment for the contestant, amended the statement on motion for new trial, against the objection of the proponent of the will, by inserting facts adverted to in the argument, but which were not proved or offered to be proved at the trial, it must be presumed upon appeal that the court, in coming to its conclusion, considered the facts contained in such amendment, and the judgment will be reversed.—*Id.*

10. LIBEL—EVIDENCE—RES GESTÆ—CERTIFICATE OF CHARACTER—CONTRADICTION OF WITNESS.—Where a libel is justified on the ground of its truth, and a witness for the defendant has testified that the plaintiff was denounced by himself and all good citizens at the place of his residence, on a certain date, a certificate of recommendation of the plaintiff for good and correct habits in business and social relations, signed by several prominent citizens of that place, at a date four months earlier, is not admissible as part of the *res gestæ*, to contradict the statement of the witness, nor to prove the good character of the plaintiff.—*Jones* v. *Duchow*, 109.

11. IMPEACHMENT OF WITNESS—SPECIFIC ACTS—BATTERY.—A witness cannot be impeached by evidence of particular wrongful acts; nor is it proper to ask him, for the purpose of impeachment, whether he had been arrested, pleaded guilty, and paid a fine for beating, bruising, and battering a woman of the town.—*Id.*

12. OBJECTION TO IMPEACHING EVIDENCE.—An objection to such question, on the ground that it did not tend to impeach the witness, and that the record was the best evidence, is specific enough to invoke the rule which does not permit a witness to be impeached by evidence of particular wrongful acts.—*Id.*

13. IMPEACHMENT OF WITNESS—CONTRADICTORY STATEMENT AFTER TESTIMONY GIVEN—INSUFFICIENT OBJECTION.—The question of the admissibility of evidence offered for the impeachment of a witness, by showing that *after* his testimony was given he had made contradictory statements, is not raised by an objection that no proper foundation had been laid for impeachment, if the objection was expressly limited to evidence of *prior* contradictory statements.—*Clavey* v. *Lord*, 413.

14. IMMATERIAL EVIDENCE — HARMLESS ERROR — APPEAL.—Where evidence, admitted against objection, relates only to an issue which is rendered immaterial by the evidence and findings upon other issues, which are decisive of the case, any error

EVIDENCE (Continued).

in its admission is harmless, and is not ground for reversal of the judgment.—*Id.*

15. EVIDENCE — CROSS-EXAMINATION — INJURY — SUMMONING PHYSICIAN.—Where the plaintiff has testified upon direct examination as to the injury suffered by her and the pain immediately resulting therefrom, she may be asked on cross-examination as to whether she called a doctor that night.—*McFadden* v. *S. A. etc. R'y Co.*, 464.
16. EXPERT EVIDENCE—CONSULTATION OF PHYSICIANS—CROSS-EXAMINATION AS TO CONCLUSION AND TREATMENT.—Where a physician, as an expert, has testified in chief that he visited the plaintiff about two weeks after the injury, and held a consultation with the attending physician, and that he examined the patient as to her condition and the probable causes of her ailments, it is proper cross-examination to ask what they determined was the serious thing to attend to, and what was the treatment advised.—*Id.*
17. RANGE OF CROSS-EXAMINATION.—The cross-examination of a party, or of an expert, should be allowed a liberal range, touching all matters testified to in chief, or tending to test the temper, bias, motives, intelligence, accuracy, credibility, or means of knowledge of the witness.—*Id.*

See PRINCIPAL AND AGENT, 2–4; APPEAL, 6, 8–11, 14; ASSIGNMENT, 3; BANKS, 2–4; BOUNDARY, 2, 5; CRIMINAL LAW, 23–28, 30–32; DEBTOR AND CREDITOR; DEDICATION, 1–4; INSANE PERSONS, 6; LANDLORD AND TENANT, 7; MALICIOUS PROSECUTION; MANDAMUS, 4; NEGLIGENCE, 1, 5, 6; PRACTICE, 3.

EXECUTION.

1. SUPPLEMENTAL PROCEEDINGS—TORTS UPON PROPERTY OF JUDGMENT DEBTOR—CREDITOR'S BILL—ORDER ALLOWING SUIT.—Proceedings supplemental to execution can reach choses in action arising from torts committed on the property of the judgment debtor which might be reached by a creditor's bill; and the court in the supplemental proceedings may authorize a suit by the judgment creditor to recover such choses in action.—*Staples* v. *May*, 178.
2. EXEMPTION FROM EXECUTION—REMEDIAL STATUTES—CONSTRUCTION.—Statutes exempting personal property from execution are remedial in character, and are to be liberally construed, as being intended to protect the debtor, and enable him to follow his vocation, so as to earn a support for himself and family.—*Estate of McManus*, 292.
3. IMPLEMENTS—TOOLS—CONSTRUCTION OF CODE.—The term "implements," as used in subdivision 4 of section 690 of the Code of Civil Procedure, which provides that "the tools or implements of a mechanic or artisan necessary to carry on his trade" shall be exempt from execution, has a broader signification than the term "tools," and includes any instrument needed and used for the purpose of carrying on his trade or business.—*Id.*
4. JEWELER'S SAFE—INSOLVENCY.—A jeweler's safe owned and used in the business of a jeweler and watch-repairer is exempt from execution, and should be set apart as such to him in proceedings in insolvency.—*Id.*

EXECUTORS AND ADMINISTRATORS. See ESTATES OF DECEASED PERSONS.

FACTOR. See BAILMENT.

FINDINGS.

1. ALLEGATIONS NOT DENIED.—Where some of the material allegations of the complaint are not denied, it is not necessary to find in relation to them.—*Drinkhouse* v. *Spring Valley Water Works*, 253.
2. ULTIMATE FACTS.—Findings should respond to and cover all material issues raised by the pleadings, but they should be statements only of ultimate and not of probative facts, and will be held sufficient where all the material ultimate facts are passed upon.—*Smith* v. *Mohn*, 489.

See APPEAL, 6, 8, 10, 11, 23; MECHANIC'S LIEN, 9, 11, 19.

FORFEITURES. See LANDLORD AND TENANT, 1-4.

FRANCHISE. See CORPORATION, 4, 5

FRAUD

1. VENDOR AND PURCHASER — FRAUDULENT REPRESENTATIONS OF VENDOR'S AGENT — KNOWLEDGE OF VENDEE — CONFLICTING EVIDENCE—REVIEW ON APPEAL.—Where alleged fraudulent representations in the sale of land are claimed to have been made by the agent of the vendor, and the evidence shows that the vendee had means of knowledge as to the facts, and is conflicting as to whether the representations were made, a finding that there was no fraud on the part of the vendor will not be disturbed on appeal.—*Williams* v. *Mitchell*, 532.
2. MORTGAGE FOR PURCHASE-MONEY—FAILURE OF CONSIDERATION—INVALIDITY OF WATER CERTIFICATES.—The fact that "water certificates" of a water company, forming part of the property sold, are invalid, does not constitute a partial failure of the consideration of a note and mortgage given for the purchase-money, if the water company has not failed or refused to furnish the water in conformity with the certificates, and is ready and willing to perform its obligation.—*Id.*
3. RESCISSION BY PURCHASER—UNREASONABLE DELAY.—The rescission by the purchaser of an executed contract for the sale of land and water certificates on the ground that the water certificates are void, and that the consideration has failed, must be made with reasonable promptness; and a delay of seventeen months after the purchase, and until two months after the commencement of a suit to foreclose a mortgage given for the purchase-money, before offering to rescind, is unreasonable.—*Id.*
4. PLEADING—GENERAL ALLEGATION—WAIVER—APPEAL—OBJECTION FOR FIRST TIME.—Where an answer alleges fraud in general terms, and the plaintiff goes to trial upon the issue without objection to the pleading, or to the evidence of fraud, all objection is waived, and it cannot be urged upon appeal for the first time that there was no issue of fraud by reason

FRAUD (Continued).

of the failure of the answer to allege the particular facts constituting the fraud.—*Sukeforth* v. *Lord*, 399.

5. JUSTIFICATION OF ATTACHMENT—FRAUDULENT TRANSFER—DEMURRER—WAIVER.—The answer of a sheriff in an action for damages for seizing goods claimed by the plaintiff, under a writ of attachment against his vendor, which denies the plaintiff's title, and pleads in general terms that the sale to him was pretended, false, and fraudulent, and made with the purpose and intent to hinder, delay, and defraud his creditors, is demurrable on account of the general allegation of fraud; but a failure to demur to the answer, or object to the evidence of the fraud, is a waiver of the objection.—*Id.*

6. FAILURE TO OBJECT TO EVIDENCE — NEW-TRIAL STATEMENT.—Where the party pleading fraud generally moves for a new trial, and the statement fully sets out the evidence of fraud, and specifies sufficiently that the verdict is against that evidence, the fact that no objection to the evidence of fraud appears in the statement is sufficient proof that none was made at the trial.—*Id.*

7. BENEFIT OF WAIVER—APPEAL BY PARTY PLEADING FRAUD GENERALLY.—The fact that the verdict was against the party alleging the fraud in general terms is not ground for denying him, on appeal, the benefit of the waiver by the prevailing party of the insufficiency of the allegations of fraud.—*Id.*

See TRUST, 3, 4.

8. FRAUDULENT TRANSFER—INSTRUCTIONS.—Where facts are established from which the jury would be justified in inferring fraud in the transfer of goods to the plaintiff, though the inference may not be absolutely necessary, the defendant is entitled to have the issue of fraud submitted to the jury upon instructions fully and fairly stating the law applicable to a fraudulent transfer.—*Sukeforth* v. *Lord*, 399.

9. VALUE OF GOODS—ADMISSION OF PLEADINGS—ERRONEOUS INSTRUCTION.—Where the pleadings admit the value of the goods seized by the defendant, an instruction authorizing the jury to find a less value is erroneous, though perhaps not sufficient ground for a reversal.—*Id.*

10. PREFERENCE OF CREDITOR—GOOD FAITH.—Instructions to the effect that a transfer of property by a debtor to one creditor in preference to others is not necessarily fraudulent, although not positively erroneous, should be qualified by the statement that the transfer must be made in good faith.—*Id.*

11. FRAUD IN LAW—CONSCIOUSNESS OF WRONG.—It is error to refuse an instruction that a man is guilty of fraud in doing what the law deems fraudulent although he may not be conscious that he is committing any wrong.—*Id.*

12. FRAUDULENT INTENT—TRANSFER TO CREDITORS IN EXCESS OF DEMAND.—The acceptance by a creditor from an insolvent debtor of an amount of property largely in excess of his demand is a circumstance tending to prove a fraudulent intent, and a refusal to so instruct the jury is erroneous.—*Id.*

13. AGREEMENT TO REFUND SURPLUS.—An agreement between an insolvent debtor and a creditor, to whom he transferred all

FRAUD (Continued).

his property, that the creditor would refund the surplus proceeds, is a circumstance tending to show that the transfer was made with intent to delay and defraud creditors, and it is error to refuse an instruction to that effect.—*Id.*

14. EVIDENCE OF AGREEMENT.—The fact that the value of the property so transferred is grossly in excess of the creditor's claim is a circumstance tending to show that such an understanding exists, and the jury should be so instructed.—*Id.*
15. CIRCUMSTANTIAL EVIDENCE.—Where the evidence of the alleged fraud is circumstantial and presumptive, it is error to refuse a correct instruction as to the necessity in most cases of relying upon such evidence to prove fraud, and as to the amount of proof required to establish it satisfactorily.—*Id.*
16. VENDOR AND PURCHASER — FRAUDULENT REPRESENTATIONS OF VENDOR—PROSPECTS AFFECTING VALUE OF LAND SOLD—MEASURE OF DAMAGES.—In estimating the damages to a vendee for fraudulent representations of the vendor in regard to prospects affecting the value of the land sold, where part only of the representations made are untrue, it is not proper to consider what would be the value of the land if all the representations made were untrue, nor what its value would be exclusive of an existing prospect, in respect to which the representations were partially false; but the difference should be taken between the price paid by reason of the false representations as to its value, supposing them to be true, and the actual value of the land at the time of purchase, in view f prospects actually existing.—*Harvey* v. *Hadley*, 557.

See AGENCY, 5; PUBLIC LANDS, 19.

GROWING CROPS. See WAREHOUSEMAN.

GUARDIAN AND WARD.

1. ACTION ON NOTE—PARTIES—INCOMPETENT PERSON—GUARDIAN.—An action upon a promissory note made by an incompetent person cannot be maintained against his guardian, but should be brought against the incompetent person.—*Justice* v. *Ott*, 528.
2. SERVICE OF SUMMONS—APPEARANCE OF GUARDIAN.—The summons in an action against an incompetent person must be served upon both the incompetent and his guardian; and it is then the duty of the guardian to appear and defend the action.—*Id.*
3. GUARDIAN AD LITEM.—If deemed expedient, the court may also appoint a guardian *ad litem* to represent the incompetent.—*Id.*

See INSANE PERSONS.

HABEAS CORPUS. See CRIMINAL LAW; INSANE PERSONS, 2, 3.

HOMESTEAD. See PUBLIC LANDS, 6–9.

HUSBAND AND WIFE. See NEGLIGENCE, 7–9; PUBLIC LANDS, 3–9; WILLS.

INFANTS. See TRUST.

INJUNCTION.

1. SEVERAL TORTS—COMMON INJURY—DAMAGES—JOINT ACTION.—Several tort-feasors, not acting in concert or by unity of design, are not liable to a joint action for damages, although the consequences of the several torts have united to produce an injury to the plaintiff.—*Miller* v. *Highland Ditch Co.*, 430.
2. INJUNCTION.—An injunction will be sustained in such case against all the tort-feasors.—*Id.*
3. DITCHES—DEBRIS—INJUNCTION—JOINT JUDGMENT FOR DAMAGES.—Where *débris* is deposited upon the lands of the plaintiff by means of different ditches constructed and operated by several defendants, between whom there was no concert of action, a joint action may be maintained to enjoin them all from continuing the wrong, but a joint judgment for damages in such action is erroneous, and will be reversed.—*Id.*

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 3; EASEMENT, 4; IRRIGATION DISTRICTS, 5; MUNICIPAL CORPORATIONS, 6, 12–14; NUISANCE, 2, 3; WATER AND WATER RIGHTS, 5, 7, 8.

INNKEEPERS.

1. LIABILITY FOR LOSS OF BAGGAGE—ACCIDENTAL FIRE—GUESTS—BOARDERS.—Conceding, without deciding, that under the law of this state an innkeeper is an insurer of the goods of transient travelers or guests placed in the inn, against everything but the act of God or the public enemy, or the neglect or fraud of the owner of the property, the innkeeper is not liable to a boarder for the loss of baggage destroyed as the result of a purely accidental fire.—*Moore* v. *L. B. D. Co.*, 483.
2. PLEASURE RESORT — RESIDENCE — RECEPTION OF FAMILY AS BOARDERS.—A family going to an inn at a pleasure resort to remain an indefinite time, which may be very prolonged, depending on the health of one of its members, and who have no other place of residence, and have previously made arrangements for board by the month at terms much lower than those for transient travelers, become boarders, and not mere transient travelers or guests.—*Id.*

INSANE PERSONS.

1. RESTORATION TO CAPACITY—CONSTRUCTION OF CODE.—The provisions of section 1766 of the Code of Civil Procedure, authorizing the court to restore a person adjudged insane or incompetent, is only applicable to those for whom guardians have been appointed under section 1764 of the same code, and does not apply to persons committed to insane asylums under the regulations of the Political Code.—*Kellogg* v. *Cochran*, 192.
2. DISCHARGE FROM INSANE ASYLUM—JURISDICTION OF COURT—HABEAS CORPUS.—No court in this state is authorized to discharge a person who has been committed to an insane asylum, or to restore him to capacity, under any circumstances, except upon writ of *habeas corpus*.—*Id.*
3. POWER OF OFFICERS OF ASYLUM.—The power to discharge an inmate of an insane asylum otherwise than upon *habeas*

INSANE PERSONS (Continued).

corpus is vested exclusively in the officers of the asylum, and includes the power to determine whether the patient has recovered, and the authority to discharge persons who have sufficiently recovered, and also persons who have been improperly committed.—*Id.*

4. EFFECT OF DISCHARGE FROM ASYLUM — RESTORATION TO CAPACITY—RIGHT TO SUE.—The effect of a discharge by the officers of an asylum of an insane inmate, if no guardian has been appointed under the act of March 9, 1885, is to restore the person discharged to legal capacity to sue.—*Id.*
5. MALICIOUS PROSECUTION — COMMITMENT OF SANE PERSON TO ASYLUM.—An action for damages will lie for a malicious prosecution on a charge of insanity, resulting in an order of commitment to an insane asylum of a person who was not insane.—*Id.*
6. ORDER OF COMMITMENT—EVIDENCE—PROBABLE CAUSE.—In such action, the order of commitment is not conclusive evidence against the plaintiff of his insanity at any time, or of probable cause for the prosecution.—*Id.*

See GUARDIAN AND WARD.

INSOLVENCY.

PREFERENCE OF CREDITOR—RECOVERY BY ASSIGNEE—PLEADING.—Unless it appears that an insolvent transferred his property to a creditor within one month before proceedings in insolvency were instituted, with the view or intention on his part to give preference to the creditor, it is immaterial what were the views or motives of the creditor in receiving the property, or what he suspected or believed as to the solvency of the debtor, and the property cannot be recovered from the creditor by the assignee, without an allegation in the complaint as to the intention of the insolvent debtor.—*Hass* v. *Whittier, Fuller & Co.*, 613.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; EXECUTION, 4; WAREHOUSEMAN, 3, 5.

INSTRUCTIONS.

1. EXCEPTION TO INSTRUCTIONS — ENTRY OF EXCEPTION.—Where the record shows that counsel for the defendant, as the jurors were retiring, asked to have an exception entered to all the instructions given at the request of the plaintiff and on the court's own motion, and to all instructions refused upon the request of the defendant, to which request the court assented, a sufficient exception is shown as to the written requests to charge given and refused, though not to the oral charge of the court; and the fact that no exception was in fact entered in the minutes of the court, nor in the reporter's notes of the trial, is immaterial.—*Sukeforth* v. *Lord*, 399.
2. VERDICT AGAINST LAW—QUESTION OF FACT.—A verdict cannot be said to be against law, as contrary to the instructions of the court, because inconsistent with the facts as maintained by one party, if the jury might, upon the evidence,

INSTRUCTIONS (Continued).

have decided the question of fact contrary to such party, and consistently with the instructions.—*Northern R'y Co.* v. *Jordon*, 23.

See CRIMINAL LAW, 35, 36; FRAUD, 8–15; NEGLIGENCE, 13, 14.

INSURANCE.

1. MUTUAL BENEFIT ASSOCIATION—INSURANCE OF LIFE—CHANGE OF BENEFICIARY.—Where a certificate of membership in a mutual benefit association, purporting to be an insurance on the holder's life, payable after his death to his wife as beneficiary, provides that the member may, in writing filed with the association, substitute some other beneficiary, the sending of a letter to and filing it with the association by the holder of the certificate, requesting that the beneficiary be changed to the executors named in his will, and an indorsement upon the certificate, signed by the secretary, changing and substituting the beneficiary, is a substitution in writing of another beneficiary, in accordance with the provisions of the certificate.—*Bowman* v. *Moore*, 306.
2. CHANGE IN WRITING—ACT OF SECRETARY—AGENCY.—It is not necessary, to effect a change of the beneficiary, that the change should be wholly in the handwriting of the member; but it may be done through the agency and handwriting of the secretary, provided it was done by the authority of the member, and for him.—*Id.*
3. SUBSTITUTION OF EXECUTORS AS BENEFICIARIES — WILL — DEVISE.—The substitution of the executors of the member as his beneficiaries, and the insertion in his will of a direction to them to apply the proceeds in payment of his debts, is not an attempt to devise by will the policy or its proceeds.—*Id.*

IRRIGATION DISTRICTS.

1. WRIGHT ACT — CONSTITUTIONAL LAW — CORPORATIONS.—The Wright act (Stats. 1887, p. 29), providing for the organization of irrigation districts, is constitutional, and the districts organized under its provisions are public corporations. —*Crall* v. *Board of Directors of Poso Irrigation District*, 140.
2. CONFIRMATION OF ORGANIZATION—PROCEEDING IN REM—STATUS OF DISTRICT—POWER TO ISSUE BONDS.—A special proceeding by the directors of an irrigation district, brought under the act supplemental to the Wright act (Stats. 1889, p. 212) providing for special proceedings in the superior court for the confirmation of the organization of the district and of the issue and sale of bonds, is in the nature of a proceeding *in rem* to determine the *status* of the district, and its power to issue valid bonds.—*Id.*
3. CONSTRUCTIVE SERVICE OF PROCESS—JURISDICTION—RES ADJUDICATA.—In such proceeding, constructive service of process by publication and posting, as prescribed by the Wright act, is sufficient to give the court jurisdiction of the subject-matter and of the parties, and its judgment is valid and binding as against them and all the world, upon all questions involved in the case, until reversed on appeal, or set aside by some direct proceeding instituted for that purpose. —*Id*

IRRIGATION DISTRICTS (Continued).

4. INJUNCTION — SALE OF BONDS — DEFECTS IN ORGANIZATION—PLEA IN BAR.—Such judgment is a valid plea in bar to an action to enjoin the sale of bonds of the irrigation district, brought by a party constructively served with process in the proceeding *in rem*, and no alleged defects in the organization of the district can be reviewed in the injunction suit. —*Id.*

JUDGE. See CONTEMPT.

JUDGMENT.

1. JUDGMENT ON PLEADINGS—MATERIAL ISSUE.—A judgment on the pleadings cannot be taken where a single material issue is presented by the answer.—*Widmer* v. *Martin*, 88.
2. ACTION TO RECOVER DEPOSIT — VENDOR AND PURCHASER—DEFECTIVE TITLE.—In an action by the vendee to recover back a deposit made under a contract for the purchase and sale of land, by the terms of which the vendor was to convey the land as soon as he received a deed, and in case of a defective title, to return the deposit made, where the complaint alleged a demand by the plaintiff for a conveyance, and a refusal by the defendant to convey, on the ground of an alleged defective title, an answer denying such allegations, and alleging that the defendant expects to be and will be able soon to obtain the legal title, raises material issues, which the defendant is entitled to have tried, and a judgment on the pleadings in favor of the plaintiff is erroneous.—*Id.*
3. EJECTMENT — QUIETING TITLE — JUDGMENT ON PLEADINGS.—When a complaint contains the usual allegations in ejectment, and all that are necessary to quiet title, and prays that defendants be required to set forth their claims, and that they be adjudged invalid, that plaintiff be restored to possession, and defendants be debarred from asserting any claim to the land, and for other and further relief, and the answer denies plaintiff's alleged right of possession, a motion for judgment on the pleadings is not proper, though the denial may be subject to a special demurrer; and the court could not, in view of the allegations and prayer of the complaint, give judgment without evidence, even if no answer had been filed.—*Chester* v. *Field*, 422.
4. PLEADINGS — SUPPORT OF JUDGMENT—APPEAL.—A judgment cannot be rendered which will settle rights between litigants, unless the pleadings are framed to support it.—*Northern R'y Co.* v. *Jordan*, 23.
5. VACATION OF JUDGMENT—ABSENCE OF ATTORNEY FROM TRIAL—MISTAKE AND EXCUSABLE NEGLECT—TRIAL IN ANOTHER COUNTY —AGREEMENT FOR DISMISSAL.—A motion to set aside a judgment for the defendant, upon the alleged ground of mistake and excusable neglect of plaintiff's counsel in failing to attend the trial, should be denied, where it appears that the cause was regularly set for trial by consent of parties, and had been continued for several days for the convenience of plaintiff's counsel and for the dispatch of other business, and that the plaintiff's counsel again voluntarily absented himself, without an agreement or order for further con-

JUDGMENT (Continued).

tinuance, to attend a trial in another county, and that he had promised the defendant to dismiss the case.—*Gray* v. *Sabin*, 211.

6. MOTION TO SET ASIDE ORDER—ABSENCE OF ATTORNEY AS WITNESS.—A motion of the defendant to set aside an order vacating the judgment, upon plaintiff's motion, should be granted, where it appears that the attorney for plaintiff absented himself from the trial to attend a trial in another county, not as an attorney, but solely as a voluntary witness, without subpœna.—*Id.*
7. SETTING ASIDE JUDGMENT—INADVERTENCE AND MISTAKE—DISCRETION.—The action of the trial court in setting aside a judgment upon a showing of inadvertence and mistake will not be disturbed, if the appellate court cannot say, under all the circumstances, that the court below abused its discretion, even though the showing may be a weak one.—*Underwood* v. *Underwood*, 523.
8. JUDGMENT QUIETING TITLE—DISCLAIMER—INADVERTENCE AND MISTAKE OF ATTORNEY—LIS PENDENS—DEFENSE BY GRANTEES OF DEFENDANT.—An order setting aside a judgment quieting the title of the plaintiff to city lots to which the defendant disclaimed title, and allowing the grantees of the defendant to come in and defend, will not be disturbed, if it is shown on the part of the defendant and his grantees that the disclaimer was made through an inadvertence and mistake of fact of the defendant's attorney in supposing that the property had been conveyed by the defendant before the commencement of the suit, whereas in fact the conveyances were made pending the suit, and after a notice of *lis pendens* had been filed by the plaintiff.—*Id.*

See APPEAL, 1, 3, 5, 10, 12, 13, 15, 19, 23; CLAIM AND DELIVERY, 2–6; EMINENT DOMAIN, 5, 6; INJUNCTION; MECHANIC'S LIEN, 9, 10; MORTGAGE, 9; PLACE OF TRIAL, 2.

JUDICIAL NOTICE. See AGENCY, 4.

JURISDICTION. See CONTEMPT, 3; CRIMINAL LAW, 3, 20; EMINENT DOMAIN, 2–4; IRRIGATION DISTRICTS, 4; MORTGAGE, 3, 9; MUNICIPAL CORPORATIONS, 15; PARENT AND CHILD, 3; PLACE OF TRIAL, 2; STREET ASSESSMENT, 16.

JURY AND JURORS. See CRIMINAL LAW, 17–19, 33, 34.

LANDLORD AND TENANT.

1. FORFEITURE OF LEASE — NON-PAYMENT OF RENT — DEMAND—RIGHT OF RE-ENTRY.—To give a landlord a right of re-entry for non-payment of rent, a demand of the rent, upon or after the last day on which the lessee has to pay, is essential to complete the forfeiture and enable him to maintain an action of ejectment.—*Sauer* v. *Meyer*, 34.
2. FORFEITURES NOT FAVORED.—Forfeitures are not favored; and where the right of possession of the landlord depends upon the forfeiture of the lease, the conditions of the lease involving the forfeiture must be strictly interpreted against him.—*Id.*

LANDLORD AND TENANT (Continued).

3. WAIVER OF FORFEITURE—EXTENSION OF TIME FOR PAYMENT.—An agreement that rent due for several months shall stand unpaid until a future month is a clear waiver of any forfeiture for non-payment of rent during those months, and no right of re-entry could accrue until the time stipulated in the lease has elapsed after demand of rent at the expiration of the extended time.—*Id.*
4. PREMATURE ACTION AGAINST SUBLESSEE.—Under a lease providing for the payment of rent monthly in advance, and for a right of re-entry by the landlord if any rent should be due and unpaid for ten days after the same should have been paid, and giving the lessee the right to sublet, where the lessor agreed with the lessee that the rent due for three months should stand unpaid until the first of the next month, and demanded of the sublessee the rent due on the first of such month, an action of ejectment against the sublessee, commenced four days after the demand, is prematurely brought.—*Id.*
5. LEASE—OPTION TO PURCHASE — RENEWAL—PAROL EXTENSION OF OPTION—CLAUSE OMMITTED BY AGREEMENT.—An option to purchase inserted in a lease for one year, with the understanding that the lease may be renewed from year to year, not exceeding two more years, and that the option may be exercised upon previous notice on the 1st of October in any year throughout the entire tenancy, at prices to be fixed by the lessor annually, continues under a renewed lease for a second year, though the clause mentioning the option is left out of the second lease, by agreement, as unnecessary, with the mutual understanding and agreement that the option was nevertheless extended.—*Abbott* v. *'76 Land and Water Co.*, 323.
6. PURCHASE PRICE.—The purchase price remains as specified in the lease for the first year, if the lessor did not avail himself of the right conferred by the terms of the contract to change the price for the second year, but merely refused to receive the money tendered, and repudiated the contract when the option was exercised under the second lease.—*Id.*
7. SPECIFIC PERFORMANCE—EVIDENCE—CORPORATIONS—DECLARATIONS OF SECRETARY—MANAGING AGENT.—In an action to enforce the option to purchase against the corporation lessor, statements made to the plaintiff by the secretary of the corporation, at the time of the renewal, as to the immateriality of the omission and the extension of the right of purchase under a general rule of the corporation, are admissible in evidence against the corporation, it appearing that the secretary had charge of its business, and acted for it in the leasing and selling of its lands.—*Id.*

See EJECTMENT, 2.

LANDS. See PUBLIC LANDS; VENDOR AND PURCHASER.

LEVEE. See DEDICATION, 4.

LIBEL. See EVIDENCE, 10.

LICENSE. See EASEMENT, 1, 3.

LIEN. See BAILMENT, 1; MECHANICS' LIENS; MORTGAGE; STREET ASSESSMENT; VENDOR'S LIEN.

LIS PENDENS.

AMENDMENT OF COMPLAINT.—The effect of a notice of *lis pendens* is not ordinarily destroyed by an amendment to the complaint.—*Brock* v. *Pearson*, 581.

See EMINENT DOMAIN, 5, 6.

MALICIOUS PROSECUTION.

1. DAMAGES—INJURY TO FEELINGS—PLEADINGS—EVIDENCE.—In an action for damages for malicious prosecution of a criminal action, injury to the plaintiff's feelings, caused by the arrest, may be proved under the general allegation of damages, and need not be specially pleaded.—*Shatto* v. *Crocker*, 629.
2. EVIDENCE—PROCEEDINGS IN CRIMINAL ACTION—INSUFFICIENT OBJECTIONS.—An objection to the introduction of certified copies of all the proceedings in the criminal action, the papers being attached together and objected to as a whole, is properly overruled where part of the evidence offered is clearly admissible, and no specification is made as to the particular papers objected to as a whole, is properly overruled where part of the evidence offered is clearly admissible, and no specification is made as to the particular papers objected to.—*Id.*
3. COPY OF JUSTICE'S DOCKET.—A certified copy of the entries in a justice's docket is *prima facie* evidence of the facts stated, and is admissible for plaintiff in action for malicious prosecution of a criminal proceeding before the justice.—*Id.*

See INSANE PERSONS, 5, 6.

MANDAMUS.

1. QUESTION OF TITLE—DISCRETION.—Although *mandamus* is not the appropriate remedy to determine the question of title to real estate, where such title is directly in issue, yet where the question is incidental merely, and may affect the discretion of the court in awarding or denying the writ, it is proper that the court should be satisfied upon the subject.—*Eby* v. *Board of School Trustees of Red Bank School District*, 166.
2. DEFENSE—DENIAL OF TITLE—POSSESSION OF DEFENDANT—DISMISSAL.—Where possession of the defendant appears, which is *prima facie* evidence of title, the question whether it is based upon a paramount title or not cannot be put in issue or litigated in a *mandamus* proceeding, nor can the defendant ask for a dismissal of the proceeding on the sole ground that by the answer the title to real estate is put in issue.—*Id.*
3. SCHOOL-HOUSE SITE—TITLE TO LOT.—In a proceeding for a writ of mandate to a board of school trustees to compel them to proceed to rebuild upon the old site a school building which had been destroyed by fire, where it appears that it was resolved, at a meeting of the electors of the district, that the site should not be changed, and the district had been for a number of years in possession of the lot, using it for school purposes, under such circumstances as to authorize its continued use for such purposes, the trustees cannot raise the

MANDAMUS (Continued.

question of title to the lot, or plead that the district had no title thereto, as a defense to the proceeding.—*Id.*

4. EVIDENCE—POSSESSION—DEDICATION.—In such proceeding, evidence tending to show the possession of the property by the school district, and that it was dedicated to the district for school purposes, is admissible to enable the court to ascertain whether or not it should, in its discretion, grant the writ.—*Id.*

5. PARTIES—TAX-PAYER—LOCATION OF SCHOOL-HOUSE SITE.—A tax-payer of a school district, whose children attend the school, is a party "beneficially interested," under section 1086 of the Code of Civil Procedure, providing for the issuance of a writ of mandate "on the application of a party beneficially interested," and may maintain a proceeding for a writ of mandate to compel the board of school trustees to comply with the instructions of the electors as to the location of the school-house site.—*Id.*

6. EQUITABLE REMEDY.—The existence of an equitable remedy does not deprive a party of the legal remedy of *mandamus*.—*Id.*

7. SETTLEMENT OF EXCEPTIONS—LACHES.—*Mandamus* will not lie to compel the judge to settle a bill of exceptions or statement when the counsel for the moving party failed to appear at the time fixed for the settlement, and thereafter withdrew the draught and amendments from the control of the judge, and held them for a month before presenting them again for settlement, without excuse for the delay.—*Coffey* v. *Grand Council*, 367.

8. INADVERTENCE.—The fact that the failure to appear at the hour fixed for the settlement of the statement was through inadvertence cannot be considered in the supreme court upon application for a *mandamus* to compel the settlement. The only power to relieve from the inadvertence is in the court below, and not in the supreme court.—*Id.*

9. SERVICE OF PETITION AND WRIT—DISMISSAL OF PROCEEDING.—The failure to serve a copy of the petition and writ upon the opposite party, as required by rule 28 of the supreme court, is ground for dismissing the petition for the writ of mandate, if no offer is made to comply with the rule.—*Id.*

See BOUNDARY, 4; STREET ASSESSMENT, 2.

MAP. See DEDICATION, 1-3.

MARRIAGE CONTRACT. See WILLS.

MEASURE OF DAMAGES. See DAMAGES.

MECHANICS' LIENS.

1. FORECLOSURE—PLEADING—DEMURRER—APPEAL—OBJECTION FOR FIRST TIME.—An objection to the complaint in an action to foreclose a lien for materials furnished a contractor, on the ground that it states merely a conclusion of law as to the

FRAUD (Continued).

amount due and owing from the owner to the contractors, and that it contains no specific averment as to what was the contract price between them, or that there was any express agreement to pay anything, or what was the reasonable value of the work to be done, can only be raised by demurrer, and cannot be urged for the first time on appeal.—*Russ Lumber and Mill Co.* v. *Garrettson*, 589.

2. NOTICE OF CLAIM TO OWNER—DUTY OF OWNER.—Under sections 1183 and 1184 of the Code of Civil Procedure, whether a building contract is recorded or not, if proper notice is given to the owner, by a material-man, of the material furnished to the contractor, it is the duty of the owner to withhold from the contractor sufficient money to pay the claim, if it is then due or afterwards becomes due.—*Id.*
3. CONTENTS OF NOTICE—PLEADING.—A complaint alleging that materials were furnished by the plaintiff for the construction of a building at the request of contractors named, and stating in general terms the kind and total price of the materials, and that the plaintiff gave the owner a written notice that it had agreed to furnish the materials "as aforesaid," sufficiently shows the contents of the notice to meet the requirements of section 1184 of the Code of Civil Procedure.—*Id.*
4. COPY OF CLAIM OF LIEN—PLEADING.—The contents of the claim of lien may be pleaded by attaching a copy thereof to the complaint, and making it a part thereof by apt reference.—*Id.*
5. CLAIM OF LIEN—SUBSTANTIAL COMPLIANCE WITH STATUTE.—A claim of lien is sufficient if it substantially complies with the statute.—*Id.*
6. NAME OF OWNER OF BUILDING.—A claim of lien stating that a person named was the owner of a lot of land described, and that he entered into a contract with persons named to erect and finish a building on the lot, which was completed at a time named, sufficiently states that the owner of the lot was the owner of the building, and designates the name of the owner of the building.—*Id.*
7. TERMS OF CONTRACT.—A statement is the claim of lien that the claimant furnished the materials under a contract with the contractors named, by which they agreed to pay the market value thereof at the date of delivery in cash, and showing the whole value of the materials furnished and balance unpaid, sufficiently shows the names of the persons to whom the materials were furnished and the terms of the contract.—*Id.*
8. CLAIM OF CHARGE UPON PROPERTY.—A statement in the claim of lien that the claimant "claimed the benefit of the provision of the Code of Civil Procedure relating to lien of mechanics on real property" sufficiently purports to charge the property described in the claim.—*Id.*
9. GENERAL FINDING—VALIDITY OF LIEN—SUPPORT OF JUDGMENT.—A general finding to the effect that the plaintiff's claim of lien duly verified was filed for record in the office of the recorder of the county where the premises are situated, pursuant to the Code of Civil Procedure, and that said claim of lien is in due form, and was filed in due time, and is a valid subsisting claim of lien under the law, is sufficient to support a judgment foreclosing the lien.—*Id.*

MECHANICS' LIENS (Continued.)

10. LIENS FOR MATERIALS—JUDGMENT AGAINST CONTRACTORS—FORECLOSURE.—A judgment against the contractors to whom the materials were furnished is not necessary to support the lien of the material-man; and the fact that the contractors are parties defendant, and no judgment is taken against them, is not ground for reversing a judgment foreclosing the lien against the owner of the building.—*Id.*
11. MECHANIC'S LIEN—SUBSTANTIAL PERFORMANCE OF CONTRACT—FINDINGS—INCONSISTENCY.—In an action to foreclose a mechanic's lien for painting, varnishing, and graining a building, findings that some small places in the house were not properly grained and finished, and that the cost of properly finishing them would be not more than five dollars, are not inconsistent with a finding that the plaintiff substantially performed his contract.—*Harlan* v. *Stufflebeem*, 508.
12. SUBSTANTIAL PERFORMANCE SUFFICIENT — RECOUPMENT FOR SLIGHT OMISSION—RIGHT OF ACTION.—In contracts for the construction or repair of buildings, a substantial performance is sufficient to entitle the contractor to compensation for the work done under the contract; and if there is an omission or imperfection so slight that it cannot be regarded as an integral or substantive part of the original contract, and the owner can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action, especially where the owner has received the benefit of what has been done.—*Id.*
13. TRIVIAL IMPERFECTION.—A trivial imperfection in the work cannot prevent the filing or foreclosure of a lien by the contractor for the work done by him under the contract.—*Id.*
14. CONTRACT—SUBSTANTIAL PERFORMANCE—QUESTION OF FACT—FINDING.—Whether a contract has been substantially performed is a question of fact to be determined from the facts and circumstances of the case, and a finding of the trial court thereon is as conclusive as upon any other question of fact.—*Id.*
15. CONTRACT WITH LESSEE—INTEREST OF OWNER—FAILURE TO GIVE NOTICE.—The interest of the owner in lands leased is subject to a lien for materials used in the construction of a building thereon, erected under a contract by the lessee, if the owner fails to give notice that he will not be responsible for the same.—*Id.*
16. MECHANICS' LIENS—MORTGAGE—PRIORITY—SALE OF EQUITY.—The lien of a material-man for lumber furnished for a dwelling will take precedence of a mortgage of the land executed immediately upon a conveyance thereof, but after the time when the materials were commenced to be furnished, notwithstanding the mortgage was given for the purchase price of the land to a vendor who had sold it to the mortgagor prior to the furnishing of any materials, and who had conveyed it to the mortgagor on the same day that he received his own deed from a prior vendor, from whom he had purchased it.—*Avery* v. *Clark*, 619.
17. MORTGAGE AT TIME OF CONVEYANCE—PRIORITY—CONSTRUCTION OF CODE.—Section 2898 of the Civil Code, declaring that a mortgage for the price of real property given at the time of

MECHANICS' LIENS (Continued).

its conveyance has priority over all other liens created against the purchaser subject to the recording laws, does not give priority to the mortgage over a lien for building materials furnished to the vendee of the land prior to the conveyance. Such lien has priority over the mortgage under section 1186 of the Code of Civil Procedure.—*Id.*

18. NOTICE BY VENDOR OF EQUITY.—Under section 1192 of the Code of Civil Procedure, the vendor under a contract of sale of land, with knowledge that the vendee is constructing a building thereon, must give notice that he will not be responsible for the improvement, else his interest in the land to its entire extent becomes subject to liens filed pursuant to the law regulating mechanics' liens.—*Id.*

19. MATERIALS FURNISHED—CONSISTENCY OF FINDINGS—PRESUMPTION UPON APPEAL.—A finding that materials of a specified value were furnished by the claimant of a lien upon a dwelling-house, to be used in its construction, is not inconsistent with a finding that part of them were furnished by another party, who refused to deliver the same until paid for, and that the claimant paid such other party therefor; and it must be presumed in support of both findings, where the appeal is upon the judgment roll without a bill of exceptions, that the evidence showed that the claimant of the lien received and furnished the portion of the materials in question, under his contract with the owner of the dwelling-house.—*Id.*

MEXICAN GRANT. See DEDICATION, 5; PUBLIC LANDS.

MINES AND MINING. See MORTGAGE, 1–7.

MORTGAGE.

1. MINES — MORTGAGE OF PATENTED MINERAL TRACT—APPURTENANCES—LODE IN ADJOINING TRACT.—A mortgage of a patented tract of mineral land, with the appurtenances thereto, does not cover an undeveloped portion of a lode the *situs* of which is in land adoining the patented tract; and such portion of the lode does not become parcel of or appurtenant to the tract mortgaged by being subsequently connected therewith by workings on the lode.—*Staples* v. *May*, 178.

2. SUBSEQUENT POSSESSION—INCLOSURE OF MINERAL LAND—TITLE TO MINERAL LODE.—The subsequent possession of the adjoining tract, acquired by actual inclosure thereof by the mortgagor, will not inure to the benefit of the mortgagee, but is sufficient to give the possessor title to a mineral lode contained therein as against all persons not connecting themselves with the source of title by compliance with the mining laws of the United States.—*Id.*

3. FORECLOSURE SUIT—APPOINTMENT OF RECEIVER—JURISDICTION—VOID ORDER.—An order appointing a receiver in a foreclosure suit, in so far as it confers the right to occupy or mine in land not included in the mortgage or trust deed sought to be foreclosed, is to that extent in excess of the jurisdiction of the court and void.—*Id.*

4. POWER OF RECEIVER—CONSTRUCTION OF ORDER—MINING WITHOUT AUTHORITY.—An order appointing a receiver in a foreclosure suit must be construed with reference to the plead-

MORTGAGE (Continued).

ings upon which it is based, and cannot confer color of authority upon the receiver to extract ores from lands not covered by the securities involved in the suit.—*Id.*

5. LIABILITY OF RECEIVER—PROPERTY OF CORPORATIONS—RIGHTS OF CREDITORS—PROCEEDINGS SUPPLEMENTAL TO EXECUTION.—If the receiver works ores in lands of the mortgagor which are not included in the securities involved in the foreclosure suit, he becomes liable to the mortgagor as a trespasser for the net proceeds of the ore extracted; and the general creditors of the mortgagor may avail themselves of such liability by proceedings supplemental to execution.—*Id.*

6. UNAUTHORIZED EXTRACTION OF ORES—COMMON SYSTEM OF WORKING—NET PROCEEDS.—The fact that the part of the adjoining lode from which the ores were taken by the receiver was connected by a common system of working with the mortgaged premises, which were worked at a loss, does not relieve the receiver from liability for the net proceeds of the ores taken.—*Id.*

7. EX PARTE APPOINTMENT OF RECEIVER—PRESUMPTION—RIGHTS OF GENERAL CREDITORS.—Where the orders appointing the receiver were made *ex parte*, and it is not shown that their terms, or the proceedings of the receiver under them, ever came to the knowledge of the mortgagor, and it appears that the mortgagor was insolvent, and left its general creditors to recover what they could out of the property, without objection, the presumption is, that the mortgagor desired its property to go to its creditors according to their legal rights, and never approved the proceedings of the receiver in removing ores from the lode in the adoining tract.—*Id.*

8. FORECLOSURE OF MORTGAGE—PLEADING—ANSWER OF SUBSEQUENT MORTGAGEE — CROSS-COMPLAINT — SERVICE—DEFAULT.—In proceedings for the foreclosure of a mortgage, the answer of a subsequent mortgagee, which sets up a junior mortgage and prays for a foreclosure thereof, must be treated as a cross-complaint, and must be served upon all the parties affected thereby, including the mortgagor, though he has made default upon the original complaint.—*White* v. *Patton*, 151.

9. JUDGMENT BY DEFAULT—JURISDICTION—APPEAL.—Where such service is not made, the court has no jurisdiction to render judgment of foreclosure by default in favor of the subsequent mortgagee, even though the parties against whom the default was taken were properly served with summons issued on the original complaint and had failed to appear; and the error in rendering such judgment will be corrected upon appeal from the judgment by default.—*Id.*

10. FORECLOSURE OF MORTGAGE—FINDINGS—PERCENTAGE—APPEAL—OBJECTION FOR FIRST TIME.—In an action to foreclose a mortgage, where the court finds that there was due to the plaintiff from the defendants a certain sum for "costs, percentage, and necessary disbursements, including attorney's fees," and this sum was included in the judgment, an objection that the court was not authorized to add a percentage to the costs and disbursements cannot be considered for the first time on appeal. —*First Nat. Bank of Riverside* v. *Holt*, 158.

See MECHANICS' LIENS, 16, 17; PLEADING, 5–8, 13; VENDOR'S LIEN, 5; WAREHOUSEMAN.

MUNICIPAL CORPORATIONS.

1. CONSTITUTIONAL LAW—MUNICIPAL CHARTER—DEPOSITARY OF PUBLIC MONEYS—BANKS.—The provisions of section 44 of the charter of Los Angeles (approved January 31, 1889), which direct the city council to appoint as depositary of the public moneys the bank offering the highest rate of interest thereon, and further providing that the council shall direct the city treasurer to deposit with the bank daily all public moneys of the city by him collected or received, is unconstitutional and void.—*Yarnell* v. *City of Los Angeles*, 603.
2. DELEGATION OF POWER TO CONTROL MUNICIPAL FUNDS.—Section 13 of article 11 of the constitution, forbidding the legislature to delegate to any special commission, private corporation, company, association, or individual any power to control or in any way interfere with any county, city, town, or municipal money, forbids the delegation of power to a municipal corporation to do what the legislature is forbidden to do, there being no such power of delegation expressly conferred by the constitution.—*Id.*
3. CONSTRUCTION OF CONSTITUTION—LEGAL DEPOSITARY—LOAN OF PUBLIC MONEY.—Section 16 of article 11 of the constitution, requiring that all moneys of any municipal corporation coming into the hands of any officer thereof shall immediately be deposited with the treasurer, "or other legal depositary," etc., is intended to designate only the public officer who is the legal custodian of the municipal funds, and does not include a private individual or corporation in the phrase "legal depositary," or authorize the relation of debtor and creditor to be established between the city and a bank by a loan to it of the public money.—*Id.*
4. MAKING PROFIT FROM PUBLIC MONEY—BANK AS PUBLIC OFFICER.—A contract by a municipal corporation making the bank which will pay the highest rate of interest a depositary of the public moneys of the city, if it could be held to make the bank a public officer under the municipal charter, is in violation of section 17 of article 11 of the constitution, which makes it a felony for any officer having the possession or control of public money to make a profit therefrom.—*Id.*
5. CONFLICT WITH GENERAL LAWS—PENAL CODE—CORPORATIONS.—Section 44 of the Los Angeles charter is in conflict with sections 424 and 426 of the Penal Code, establishing penalties for certain acts committed by any person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys belonging to a city, which penalties could not be visited upon a private corporation, in whose possession and control the moneys of the city are placed.—*Id.*
6. SUIT BY TAX-PAYER—INJUNCTION.—A tax-payer of a city has sufficient interest in the subject-matter to sue to enjoin the consummation of an illegal contract by the city with a bank, by which it is proposed to take the public moneys out of the hands of the legal custodian of them and deposit them in the bank as a loan at interest.—*Id.*
7. COMPENSATION OF CITY MARSHAL.—The compensation of a city marshal of a municipal corporation of the sixth class, as fixed by the board of trustees under section 855 of the municipal corporation act, is for all duties imposed on the marshal by the act.—*Mundell* v. *City of Pasadena*, 520.

MUNICIPAL CORPORATIONS (Continued).

8. FEES FOR SERVICES IN RECORDER'S COURT.—The city marshal cannot recover from the city any fees for services rendered in arresting offenders, and summoning witnesses and jurors, by virtue of warrants of arrests, subpœnas, and *venires* issued out of the recorder's court of the city.—*Id.*

9. COUNTY GOVERNMENT ACT — PURCHASE OF REAL PROPERTY— PUBLICATION OF NOTICE—MANDATORY STATUTE—POWER OF SUPERVISORS.—The provision of the County Government Act requiring the board of supervisors of a county to publish notice of their intention to make a purchase of real property for the benefit of the county in some newspaper of general circulation published in the county, etc., is mandatory, and operates as a limitation upon the power of the board to make any purchase of real property unless the publication is made as directed.—*Winn* v. *Shaw*, 631.

10. PRICE OF PUBLICATION — COMBINATION OF NEWSPAPERS.—The fact that no newspaper published in the county is willing to publish the notice for the price fixed by the supervisors, and that all the newspapers published in the county have combined to charge higher rates for advertising than the board are willing to pay, cannot affect or alter the jurisdiction of the board, or confer upon it power to purchase real property without making the publication required by the statute.—*Id.*

11. VALIDITY OF NEWSPAPER COMBINATION.—The question as to the validity of a contract between newspapers adopting a uniform schedule of prices for advertising and printing, including all county work, is not involved in an action to prevent an illegal payment for land purchased by the supervisors without the publication of any notice.—*Id.*

12. INJUNCTION — RESTRAINING AUDITOR FROM DRAWING ILLEGAL WARRANT—SUIT BY TAX-PAYER.—A tax-payer may sue to enjoin the county auditor from drawing his warrant in payment for the purchase of land of which no notice has been published.—*Id.*

13. INTEREST OF TAXPAYER.—A tax-payer of a county has such an interest in the proper application of funds belonging to the county that he may maintain an action to prevent their withdrawal from the treasury in payment or satisfaction of demands which have no validity against the county.—*Id.*

14. DAMAGE TO COUNTY — ILLEGAL PURCHASE.—It cannot be inquired whether the county will gain or lose by an illegal purchase of land, in an action to restrain the drawing of a warrant in payment therefor, it being sufficient to support the action that the purchase was made without authority of law.—*Id.*

15. ELECTION CONTEST — JURISDICTION OF SUPERIOR COURT—COMMON COUNCIL OF OAKLAND—REPEAL OF MUNICIPAL CHARTER.—The provision of the charter of the city of Oakland enacted in March, 1854, giving the common council exclusive jurisdiction to hear and determine an election contest for the office of councilman of the city council is repealed by sections 1111 et seq. of the Code of Civil Procedure, providing for the determination of such a contest by the superior court.—*McGivney* v. *Pierce*, 124.

MUNICIPAL CORPORATIONS (Continued).

16. EXTERMINATION OF WILD ANIMALS—POWER OF SUPERVISORS—CONSTRUCTION OF COUNTY GOVERNMENT ACT.—The power conferred by the County Government Act upon boards of supervisors to provide for the destruction of gophers, squirrels, and other wild animals, noxious weeds and insects, etc., should be upheld in all cases, where the means employed are reasonable, and not otherwise objectionable, but cannot be extended so far as to require a land-owner, under a penalty, to exterminate wild animals of which he is not the owner, and over which he cannot in the nature of things have any control or dominion.—*Ex parte Hodges*, 162.

17. DESTRUCTION OF GROUND-SQUIRRELS—UNREASONABLE ORDINANCE—MISDEMEANOR—HABEAS CORPUS.—An ordinance requiring all occupants of lands, within ninety days, to exterminate and destroy the ground-squirrels on their respective lands, and thereafter to keep said lands free and clear therefrom, and declaring the violation of the ordinance to be a misdemeanor, is unreasonable and burdensome, and one convicted of a violation thereof is entitled to a discharge on *habeas corpus*.—*Id.*

18. POLICE AND SANITARY REGULATIONS—CONSTITUTIONAL LAW.—The ordinance is not a police, sanitary, or similar regulation, and is not authorized by section 2 of article 11 of the state constitution, providing for the enforcement by counties of police, sanitary, or other regulations not in conflict with general laws.—*Id.*

19. POLICE POWER—CONSTRUCTION OF CONSTITUTION.—Under section 2 of article 11 of the state constitution, providing for the making and enforcing "of all such local, police, sanitary, and other regulations as are not in conflict with the general laws," "other regulations" must be limited to objects similar to those denominated police and sanitary.—*Id.*

See CORPORATION, 4, 5; EMINENT DOMAIN, 1-4; IRRIGATION DISTRICTS; STREETS AND HIGHWAYS.

MUTUAL BENEFIT ASSOCIATION. See INSURANCE.

NEGLIGENCE.

1. RAILWAY ACCIDENT—BURDEN OF PROOF.—In an action against a railroad company to recover damages for injuries sustained by a passenger, caused by a train running off the track owing to the negligence of the railroad company, although the burden of proof is upon the plaintiff to establish negligence, yet where the injury is admitted, and the derailment and overturning of the car are undisputed facts, and there is evidence tending to show that at the time of the accident the train was running down a steep incline leading to the bed of a river, on a new and curved track, at an unusual and dangerous speed, the burden of proving that the injury was not caused by its want of care is on the railroad company.—*Mitchell* v. *Southern Pacific R. R. Co.*, 62.

2. CONTRIBUTORY NEGLIGENCE—PASSENGER INJURED FROM PLATFORM—VIOLATION OF RULES—CONSTRUCTION OF CODE.—Section

NEGLIGENCE (Continued).

484 of the Civil Code, protecting a railroad company from damages for an injury to a passenger, received on or from the platform of a car, in violation of printed regulations posted in the car, or of verbal instructions to the passenger, is intended to prevent the imprudent act of standing or riding on the platform, and neither the statute nor the regulation has any application where a passenger is justifiably entering or leaving the cars when injured.—*Id.*

3. ATTEMPT TO ESCAPE FROM PLATFORM — QUESTION OF FACT.—Where, at the time the accident occurred, the plaintiff was standing on the platform of the car, and his testimony showed that he had gone there immediately before the accident, in fear that some disaster would occur because of the speed of the train, and that he intended to jump therefrom to the sand, but that the car was overturned as soon as he reached the platform, it is a question for the jury whether the attempt thus made was an unreasonable or rash act, or was one which a person of ordinary care and prudence might do under the circumstances.—*Id.*

4. PRUDENCE OF PLAINTIFF—SATETY OF PASSENGERS—RESULT OF ATTEMPT TO ESCAPE.—The facts, that a passenger on a railroad train was injured in an attempt to escape from an expected accident, and that those who remained in the car escaped without injury, are circumstances to be considered by the jury in determining whether the injured party acted as a man of ordinary prudence; but where he has acted with reasonable prudence, upon the probabilities of an effort to escape, it cannot be said that the attempt to escape constituted contributory negligence, nor does the inquiry depend upon the result of the attempt to escape.—*Id.*

5. EVIDENCE — ACTION OF OTHER PASSENGERS — ERROR WITHOUT PREJUDICE.—In such a case, it is error to exclude evidence of the actions of other passengers, who remained in the car, and as to whether or not any of them were injured. Such evidence is competent as a part of the *res gestæ*, to show what they deemed prudent conduct. But such error is cured by the admission of undisputed evidence showing that there were only a few passengers in the car besides the plaintiff, and that they all remained in their seats until the car was overturned, and all escaped unhurt.—*Id.*

6. ERROR IN EXCLUDING EVIDENCE—VIOLATION OF RULES BY PLAINTIFF—CORROBORATION OF CONDUCTOR—CONFLICTING EVIDENCE.—In such an action, where the conductor testified that he left the car two or three minutes before the accident occurred, and that the plaintiff went out with him, and that after giving orders to let off the brakes, he went back into the car and sat down, while the plaintiff remained standing on the platform, in violation of the rules, and such evidence is in conflict with the testimony of the plaintiff, it is error to exclude a question asked one of the passengers, by the defendant's counsel, in corroboration of the conductor, as to whether the conductor returned into the car after he and the plaintiff left it, and before the accident occurred.—*Id.*

7. INJURY TO WIFE—CONTRIBUTORY NEGLIGENCE OF HUSBAND.—Contributory negligence of the husband is imputable to the

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wife, and will prevent a recovery by her for injuries sustained by the alleged negligence of a third party.—*McFadden* v. *Santa Ana, Orange, and Tustin Street R'y Co.*, 464.

8. DAMAGES FOR PERSONAL INJURY—CHOSE IN ACTION—HUSBAND AND WIFE—COMMUNITY PROPERTY.—The right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action; and if acquired by the wife during marriage, is community property, which the husband has the right to control.—*Id.*

9. ACTION FOR DAMAGES — PARTIES — HUSBAND AND WIFE.—The husband is a necessary party to an action for damages on account of injuries to the wife's person.—*Id.*

10. INDUCING CHILD TO RIDE UPON SWEEP—LIABILITY OF PERSON IN CHARGE.—Inviting and permitting a child eight years old to ride alone, in circumstances of danger, upon a sweep or pole drawn by a horse, and used to propel machinery for pumping water, in consequence of which the child is injured, is negligence on the part of the person in charge of the sweep.—*Rosenberg* v. *Durfee*, 545.

11. LIABILITY OF OWNER OF SWEEP.—A verdict against the owner of the sweep will be sustained if it appears that he, knowing that his son was in charge of the sweep at the time of the injury, and that the child was riding upon the sweep alone, in circumstances of danger, at the request of his son, permitted her to remain thus exposed, when he could have prevented it, though he may have cautioned the child to be careful, and though the child may have said there was no danger.—*Id.*

12. INDULGENCE OF CHILD—MOTIVE IMMATERIAL.—The fact that the child was a favorite with the owner of the machine and his son, and that their want of care was the result of a desire to be indulgent to her, does not excuse them from exercising the care required by law to prevent the child from placing herself in danger.—*Id.*

13. CONTRIBUTORY NEGLIGENCE OF CHILD — INSTRUCTION.—An instruction to the jury "that a child of such tender years and immature judgment as to be incapable of knowing, comprehending, and measuring the danger to which it is exposed, and of exercising the necessary precaution in guarding against it, cannot be charged with negligence in exposing itself to the threatened danger," and that in determining the question in connection with the case, they "must consider the age and sex, and all the conditions surrounding the plaintiff at the date of the injury, as disclosed by the evidence," is proper, and does not assume that the machinery causing the injury was dangerous, or tend to mislead the jury upon the question of contributory negligence.—*Id.*

14. INSTRUCTION AS TO EVIDENCE OF NEGLIGENCE.—An instruction to the effect that if the sweep was a dangerous place, and if the defendants knowingly permitted the child to ride upon it in circumstances of danger, when its parents or other guardians were not present, if the child was too young to comprehend the danger, and was injured by the machinery, it would be evidence of negligence, is not misleading, and

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does not purport to tell the jury that the injury was of itself evidence of negligence, unaccompanied by the state of facts culminating in the injury.—*Id.*

See ESTATES OF DECEASED PERSONS, 1–5.

NEGOTIABLE INSTRUMENTS.

LIABILITY OF SURETY—NOTICE OF DEMAND AND NON-PAYMENT.—One who subscribes his name upon the face of a joint note as an accommodation maker, with the word "surety" appended to his signature, is liable as a maker, and not as an indorser of the note, and his liability does not depend upon due notice of demand and non-payment.—*Southern California National Bank of Los Angeles* v. *Wyatt*, 616.

NEW TRIAL.

1. FAILURE TO FILE DECISION IN TIME — DIRECTORY STATUTE.—Section 632 of the Code of Civil Procedure, requiring the judge of the trial court to file his decision with the clerk within thirty days after the submission of the cause, is directory merely, and his failure so to do is not ground for a new trial.—*McLennan* v. *Bank of California*, 569.
2. ORDER GRANTING NEW TRIAL—REVIEW ON APPEAL—DISCRETION.—An order granting a new trial will be reversed as readily as an order refusing it, when it is granted solely through a misapprehension of law; but if the grounds of the motion are numerous, and include insufficiency of the evidence, and other grounds upon which the discretion of the court might be exercised, and the order is in general terms, and no clear abuse of discretion appears, the order will be affirmed.—*Schramm* v. *Southern Pacific Company*, 425.

NUISANCE.

1. BRASS-FOUNDRY—PROOF REQUIRED.—A brass-foundry and machinery incident thereto are not *prima facie* nuisances, and one complaining of them must allege and prove that they are such by reason of their peculiar location or the improper or negligent manner in which they are conducted.—*McMenomy* v. *Baud*, 134.
2. QUALIFIED INJUNCTION.—Where the injurious effects complained of as resulting from the running of a foundry and machinery may be prevented without entirety abating or enjoining the works or the operations thereof, only the causes of the specific injurious effects proved should be enjoined, leaving the defendant at liberty to operate his works, if he can, and elects to do so, in such a manner as to remove the cause and prevent the injury.—*Id.*
3. REVIEW ON APPEAL — FINDINGS CONTRARY TO EVIDENCE—REVERSAL OF JUDGMENT—MODIFICATION OF INJUNCTION.—Where, on account of exaggerated findings of fact not justified by the evidence, the extent of the relief by injunction to which the plaintiff is entitled against the improper operation of the foundry cannot be finally determined on the appeal, a judgment totally enjoining the operation of the foundry will be reversed, and not modified.—*Id.*

ORDINANCE. See MUNICIPAL CORPORATIONS, 16–19; TAXATION, 7.

PARENT AND CHILD.

1. ADOPTION—VOID ORDER—DIFFERENT NAMES.—An order of adoption of a child is void, and affords no warrant for the detention of the child from its parents, where it appears that the parents consented to the adoption of the child by a person of one name, that the agreement to adopt is signed by another name, and that the detention is by a person whose name does not appear in the record of the proceeding, there being nothing in the record to show that the three names indicate one and the same person.—*Ex parte Clark*, 640.
2. RESIDENCE OF PERSON ADOPTING.—It is essential to the validity of an adoption that the record should show that the person adopting the child is a resident of the county in which the order of adoption was made.—*Id.*
3. SUPERIOR COURT—SPECIAL AND LIMITED JURISDICTION.—In cases of adoption, the power of the superior court is special and limited, and not exercised according to the course of the common law; and its jurisdiction must affirmatively appear by the record as to both subject-matter and the person, notwithstanding the court is one of general jurisdiction.—*Id.*
4. COMMON LAW—STATUTORY RIGHT—STRICT COMPLIANCE WITH STATUTE.—The right of adoption is purely statutory, and unknown to the common law and repugnant to the principles; and the provisions of the statute must be strictly followed, and every condition prescribed therein strictly complied with, else the child by adoption cannot inherit from the adopting parent.—*Id.*
5. RIGHTS OF NATURAL PARENTS—DOUBTS RESOLVED IN THEIR FAVOR.—No transfer of the rights of natural parents can be acquired by adopting parents unless the statute regulating adoption is strictly followed, and all doubts in controversies between the natural and the adopting parents should be resolved in favor of the former.—*Id.*
6. HABEAS CORPUS—AMENDMENT OF RECORD OF ADOPTION.—Proceedings taken to amend the record of adoption pending the determinations, upon writ of *habeas corpus*, of the right to a transfer of the child from the custody of the adopting parties to the custody of its natural parents, cannot affect the decision of the court upon the writ, which must take the record as it finds it, and determine the rights of the parties accordingly.—*Id.*
7. ESTOPPEL OF PARENTS—ACQUIESCENCE.—The natural parents are not estopped from asserting their right to the custody of their child as against an illegal order of adoption, by acquiescence in the claim of the adopting parents for several years.—*Id.*
8. FITNESS FOR CUSTODY OF CHILD.—The relative fitness of the respective parties to care for the child cannot be inquired into upon *habeas corpus*, if it is conceded that both parties are competent and fit persons to care for the child.—*Id.*
9. EMANCIPATION OF CHILD—CONSENT TO ILLEGAL ADOPTION.—Although a parent is not entitled to the custody of a child who

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is old enough to work and care for himself, after consenting to his emancipation, there can be no basis for such a claim where the minor is a young child incapable of caring for himself, because of mere consent of the parents to an illegal order of adoption.—*Id.*

See PUBLIC LANDS, 7.

PARTIES. See EJECTMENT, 2; GUARDIAN AND WARD; INJUNCTION; MANDAMUS, 5; NEGLIGENCE, 9; QUIETING TITLE, 6; STREET ASSESSMENT, 9, 10.

PARTNERSHIP.

1. CONTRACTS—ORAL AGREEMENT — SUBSEQUENT MEMORANDUM—MERGER.—Where an oral agreement has been made and partially performed, a writing subsequently given as a mere acknowledgment or memorandum thereof, and containing nothing inconsistent therewith, does not operate to merge or supersede an express provision of the oral agreement not included in terms in the memorandum.—*Carpenter* v. *Hathaway*, 434.
2. PARTNERSHIP IN LANDS—TIME FOR DIVISION OF PROFITS.—An oral agreement for a partnership in the purchase and sale of lands to be acquired and sold in the name of one partner, with an express provision that the net proceeds of each sale were to be equally divided immediately after the sale, is not merged or superseded as to such provision by a subsequent memorandum, made after certain lands were acquired under it, which consisted of a mere written acknowledgment by the partner who had acquired the title to the land, that he had acquired it, and that it was understood and agreed that the other partner was to share equally in the net profits of the land, without stating the time of division.—*Id.*
3. REFUSAL TO ACCOUNT—ACTION FOR DISSOLUTION AND ACCOUNTING—MATURITY OF CAUSE OF ACTION.—Upon the refusal of the partner holding the legal title to account after a sale by him of part of the partnership lands, an action will lie in favor of the other copartner for a dissolution of the partnership and an accounting of the profits of the land sold, and to establish his interest in all the unsold lands acquired under the verbal agreement.—*Id.*
4. ACCOUNTING—PURCHASE OF LAND—INTEREST.—Interest, if not stipulated for in the partnership agreement, cannot be allowed on the purchase-money of the lands bought for the partnership.—*Id.*
5. TAXES AND EXPENSES—APPEAL—OBJECTIONS FOR FIRST TIME.—It cannot be objected upon appeal that no allowance was made to the defendant for taxes and necessary expenses incurred in reference to the lands, the net profits of which were to be divided, if no evidence of taxes or expenses was offered nor claim made therefor at the trial.—*Id.*
6. DECREE ESTABLISHING INTEREST IN LANDS—FUTURE TAXES—TAXATION.—No provision for future taxes need be made in a decree establishing the plaintiff's interest in the partnership lands, the legal title of which was in the defendant, as the plaintiff's interest is taxable to himself alone, and not to the defendant, after the date of the decree.—*Id.*

PLACE OF TRIAL.

1. FORECLOSURE OF VENDOR'S LIEN—VENUE OF ACTION.—An action to foreclose a vendor's lien must be commenced in the county in which the land, or some part thereof, is situated.—*Urton* v. *Woolsey*, 38.
2. JURISDICTION—APPEAL FROM JUDGMENT.—The superior court of a county in which it is sought to foreclose a lien upon real property situated in another county has no jurisdiction over the case, and no authority to enter judgment therein, and a judgment enforcing the lien will be reversed upon appeal, for want of jurisdiction.—*Id.*

See CRIMINAL LAW, 17–22.

PLEADING.

1. IMPLICATION OF LAW.—That which is implied by law need not be pleaded.—*Wilhoit* v. *Cunningham*, 453.
2. DEMURRER — AMBIGUITY AND UNCERTAINTY — CONJUNCTIVE STATEMENT OF GROUNDS.—Ambiguity and uncertainty are separate grounds of demurrer, and where such separate grounds are conjoined, the pleading must be defective on each ground, or the demurrer must be overruled.—*Id.*
3. WANT OF CAPACITY TO SUE.—A demurrer for want of capacity of the plaintiff to sue only lies where the complaint shows the want of capacity upon its face, and it is not a ground of demurrer that it does not appear in the complaint that the plaintiff has legal capacity to sue. That omission can only be taken advantage of by answer.—*Id.*
4. CAPACITY OF ASSIGNEES—AFFIDAVIT TO INVENTORY—ANSWER.—The fact that a complaint by assignees for the benefit of creditors which alleges a valid assignment, and that plaintiffs accepted the trust and duly qualified as such assignees, omits to further allege that the affidavit required by section 3462 of the Civil Code was attached to and filed with the inventory will not render the complaint demurrable for want of capacity of the plaintiffs to sue, but the omission of such affidavit must be set up in the answer.—*Id.*
5. FORECLOSURE OF MORTGAGE—NOTES PAYABLE TO TRUSTEE OF ESTATE—IMMATERIAL ALLEGATION—SUPPORT OF JUDGMENT.—In an action to foreclose a mortgage given to secure the payment of certain promissory notes, where it appears that the notes set out in the complaint were made payable to the mortgagee as trustee of the estate of a deceased person, an averment, in the complaint, that plaintiff is the owner of the notes and mortgage as trustee of the heirs of said decedent, is immaterial and redundant, and must be disregarded; and a judgment in favor of the mortgagee as trustee of the estate of the decedent is sustained by the pleadings.—*White* v. *Allatt*, 245.
6. PARTIES—TRUSTEE OF EXPRESS TRUST.—Where notes and a mortgage to secure them are taken by a trustee in his own name for the benefit of the estate of a decedent, he becomes the trustee of an express trust, and, as such, may sue to foreclose the mortgage, without joining with him the persons for whose benefit the action is prosecuted.—*Id.*
7. ATTORNEY'S FEES—NOTE NOT DUE—AMBIGUITY—CONSTRUCTION OF PLEADING.—It appearing that when the action was commenced one of the notes described in the complaint and se-

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cured by the mortgage was not yet due, an averment respecting what are reasonable attorney's fees for the foreclosure of the mortgage is not ambiguous or uncertain, but the amount demanded must be held to relate to the foreclosure as to the notes due, and not to all of the notes set up in the complaint.—*Id.*

8. REASONABLE ATTORNEY'S FEE—DISCRETION OF COURT.—In an action to foreclose a mortgage, where the mortgage stipulates for a reasonable attorney's fee in case of foreclosure, an averment as to what would be a reasonable fee is unnecessary, as such fee is a mere incident to the action, and the amount to be fixed is within the discretion of the court.—*Id.*

9. DEMURRER—AMBIGUITY AND UNCERTAINTY.—A demurrer to a complaint, on the ground of ambiguity and uncertainty in the conjunctive, cannot be sustained if the complaint is either ambiguous or uncertain, but not both.—*Id.*

10. EJECTMENT—VERDICT AND JUDGMENT—UNCERTAIN DESCRIPTION—APPEAL.—In an action of ejectment, a verdict, and judgment based thereupon, that plaintiff is entitled to the possession of land described by boundaries not corresponding to the complaint or answer, or to any documentary evidence in the case, and not mentioning any natural monuments, nor fixing the location of the lands, directly, or by reference to anything in the record or elsewhere, will be set aside upon appeal for uncertainty in description.—*Northern R'y Co.* v. *Jordan*, 23.

11. SUBSTITUTION OF PLAINTIFF—AMENDED COMPLAINT—EVIDENCE OF TITLE—CONVEYANCE PENDENTE LITE—SUPPLEMENTAL PLEADING.—The vendee of a plaintiff in ejectment who is substituted as plaintiff under an order of court, providing that all the allegations and denials of the pleadings should apply to him if the complaint as amended alleges that he was the owner at the time of bringing suit, must stand upon such allegation, and prove himself the owner at that time, and evidence is inadmissible of a deed from the original plaintiff to him, executed after the commencement of the action.—*Id.*

12. DEMURRER FOR UNCERTAINTY—COPY OF NOTE—INDORSEMENTS OF PAYMENTS—EXECUTION.—A complaint alleging that defendants executed their promissory note to the plaintiff upon a certain day, "which note is in the words and figures following," and setting forth a copy of the note, showing indorsements thereon of payments of later date than the date of the note, and alleging a payment upon the note of a sum equal to the sum of the indorsements, is not subject to a special demurrer for uncertainty as to whether the indorsements were a component part of the note at the time of its execution, or were subsequently added, nor as to whether the copy of the note set forth is a copy of the note executed.—*First Nat. Bank of Riverside* v. *Holt*, 158.

13. FORECLOSURE OF MORTGAGE—REASONABLE ATTORNEY'S FEES.—Where the mortgage provides that, in the event of foreclosure, "reasonable attorney's fees, to be taxed by the court, shall be allowed to plaintiff," an allegation in an action of foreclosure that "two hundred dollars is a reasonable attorney's fee to be allowed to the plaintiff for the collection of the said promissory note, and for the foreclosure of the said

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mortgage," being limited to the action in hand, is neither ambiguous nor uncertain; and even if the averment were uncertain, it would not be ground of demurrer, as no averment as to what would be a reasonable fee is necessary.—*Id.*

14. ASSUMPSIT—CONVERSION OF PERSONAL PROPERTY—WAIVER OF TORT.—When one person converts to his own use the personal property of another, the latter may waive the tort, and sue in *assumpsit* for the value thereof.—*Lehmann* v. *Schmidt*, 15.

See AGENCY, 14; CORPORATION, 1–3; FRAUD, 4–7; INSOLVENCY; JUDGMENT, 1–4; MALICIOUS PROSECUTION, 1; MECHANICS' LIENS, 1, 3, 4; MORTGAGE, 8, 9; QUIETING TITLE, 2–6; STREET ASSESSMENT, 10; TRUST, 4; VENDOR AND PURCHASER, 11, 12.

POLICE. See PUBLIC OFFICERS, 7, 8.

POLICE POWER. See MUNICIPAL CORPORATIONS, 16–19.

POSSESSION. See CONTEMPT; EJECTMENT; MANDAMUS, 2–4; MORTGAGE, 2; PUBLIC LANDS, 2–9

PRACTICE.

1. VERDICT IN EQUITY CASE—POWER OF COURT.—The verdict in an equity case is only advisory to the court until adopted, and the court may of its own motion disregard it and set it aside.—*Clavey* v. *Lord*, 413.
2. DELAY IN SETTING ASIDE VERDICT—WAIVER OF OBJECTION.—The fact that no action was taken by the court in respect to the verdict for three months after it was rendered, and after each party had moved for judgment upon it, is no objection to the action of the court in then disregarding it, and hearing additional evidence, it not appearing what was the cause of the delay, or that any objection thereto was urged by the appellants.—*Id.*
3. OPENING CASE FOR FURTHER EVIDENCE — DISCRETION.—It is within the discretion of the court to permit further evidence, when it sets aside the verdict in an equity case; and if both parties are permitted to introduce additional evidence without any apparent restriction, and there is no showing of surprise, or want of opportunity to produce any additional available evidence, no abuse of discretion appears.—*Id.*
4. LIMITS OF DISCRETIONARY POWER—ABUSE OF DISCRETION.—Discretionary judicial power may be exercised either way, and the only limitation upon its exercise is, that it must not be abused; and while it may be difficult to define what is meant by abuse of judicial discretion, one of its essential attributes is, that it must plainly appear to effect injustice.—*Id.*

See APPEAL; BILL OF EXCEPTIONS; FINDINGS; INSTRUCTIONS; MANDAMUS; NEW TRIAL; QUIETING TITLE.

PRESUMPTIONS.

IDENTITY.—Identity of persons is presumed from identity of name. Instance.—*Finch* v. *R. & A. R'y Co.*, 597.

PRINCIPAL AND AGENT. See AGENCY.

PRIORITY. See MECHANICS' LIENS, 16, 17.

PROHIBITION. See CONTEMPT; EMINENT DOMAIN, 1.

PROMISSORY NOTE. See NEGOTIABLE INSTRUMENTS.

PUBLIC DEPOSITARIES. See MUNICIPAL CORPORATIONS, 1–6.

PUBLIC LANDS.

1. PUEBLO LANDS—TITLE OF SAN FRANCISCO—TRUST—CONTROL OF GOVERNMENT.—The title of the city of San Francisco to the pueblo lands, as successor to the pueblo of San Francisco was not an indefeasible estate, nor strict ownership, but was a restricted and qualified right to alienate portions of the lands to the inhabitants, and to devote the residue to public uses, and was in the nature of a trust for the benefit of the inhabitants; and its right of disposition and use was in all particulars subject to the control of the government.—*Baker* v. *Brickell*, 329.
2. OUTSIDE LANDS IN SAN FRANCISCO—ACT OF CONGRESS—TRUSTS—BONA FIDE POSSESSORS.—The legal title to outside lands in San Francisco passed to the United States from Mexico upon the acquisition of California, and passed to the city by the act of Congress of March 8, 1866, upon the trusts set forth in said act, in favor of persons in *bona fide* actual possession of the same at the date of its passage, by themselves or by their tenants.—*Id.*
3. POSSESSION OF HEAD OF FAMILY—SURVIVING WIFE—TRUST.—The grant of Congress by said act to the city was intended to be made in trust for the head of a family residing on the lands, and inured to the benefit of a surviving wife in *bona fide* possession with her children at the date of its passage by virtue of such possession, and not to the estate of her deceased husband, who held *bona fide* possession prior thereto, nor would she take title from the city in trust for the estate of her husband or for their children.—*Id.*
4. POSSESSION BY TENANT—CONVENTIONAL TENANCY—HUSBAND AND WIFE.—The "possession by tenant" spoken of in the act of Congress signifies possession of a conventional tenant, and does not apply to the possession of a surviving wife continued after the decease of the husband, which occurred before the passage of the act.—*Id.*
5. ACT OF CONGRESS—ORDER 800—ORDINANCE 822—LEGISLATIVE ACTS—BONA FIDE POSSESSION—CONVEYANCE—PRESUMPTION.—Where a conveyance was made by the city in pursuance of the act of Congress of 1866, and of order 800 and ordinance 822 of the board of supervisors, and of the acts of the legislature of 1868 and 1870 ratifying said order and ordinance, to a person in actual possession of outside lands, if it does not appear that any suit was pending against such person in regard to the land, it will be presumed that no suit existed, and that the possession was *bona fide*.—*Id.*
6. HOMESTEAD—ACT OF 1862—SURVIVORSHIP—DESCENT — BONA FIDE POSSESSION OF SURVIVING WIFE.—A homestead acquired under the act of 1862 on the death of either spouse vested

PUBLIC LANDS (Continued.)

absolutely in the survivor by descent and need not be set apart by the probate court; and where it appears that the possession of outside lands by a surviving wife was under a legal devolution to her of the whole land as a homestead at the date of the act of 1866, the *bona fides* of her possession are beyond doubt.—*Id.*

7. TRUSTS—PARENT AND CHILD.—A trust arises from the contract or from circumstances which affect the conscience of a party, and charge him with the rights of another, but cannot arise in respect to outside lands in favor of children, as against a surviving wife who acquired title thereto as a *bona fide* possessor, if she had no contract with her deceased husband, and owed no duty to her children in respect to the lands.—*Id.*

8. HUSBAND AND WIFE—DEATH OF HUSBAND—POSSESSION BEFORE ACT OF 1866.—The mere possession of outside lands by a husband, who died before the passage of the act of Congress of 1866, when the title was in the United States, conferred no rights upon him or his heirs, nor could he be the recipient of a grant after his death; but the donation given by the act inured directly to the surviving wife, who was then in *bona fide* possession.—*Id.*

9. ESTATE OF DECEASED HUSBAND—ADMINISTRATION BY WIFE—ESTOPPEL—MISTAKE OF LAW.—The fact that the surviving wife became administratrix of the estate of her deceased husband, and by mistake of law, in ignorance of her rights, inventoried outside lands as his property, which did not belong to his estate, but were her own property by operation of law, does not estop her from claiming the property as her own.—*Id.*

10. PUEBLO LANDS—GRANT—ACTION OF PUEBLO AUTHORITIES—PRESUMPTION.—The presumption attaches to a grant of lands by the ayuntamiento of a pueblo to a private person, who has been put in possession by the alcalde, that the authorities of the pueblo acted within the limits of their official authority in making the grant.—*Latham* v. *City of Los Angeles*, 514.

11. PUBLIC PLAZA—PUBLIC USE OF VACANT LAND—EVIDENCE.—The presumption attaching to the grant of pueblo lands is not overcome, nor is it sufficiently established that the land granted was a public plaza at the date of the grant, by mere evidence that before the grant the land was vacant, and was used by the owners of adjacent lots in going to and from their lots, and that upon certain days the public would use it as a place for public amusements.—*Id.*

12. DEDICATION—GIFT OR ABANDONMENT TO PUBLIC—INTENTION OF OWNER—EVIDENCE—NON-ASSERTION OF RIGHT.—To show a dedication of land by the owner as a public plaza, without any conveyance, and merely by way of gift or abandonment, the intent of the owner to make the dedication should be clearly proven by evidence of his express declarations, admissions, or affirmative acts, or of circumstances establishing his purpose or intention to donate the use to the public; and the mere non-assertion of a right, without such evidence, does not establish a dedication.—*Id.*

PUBLIC LANDS (Continued).

13. PETITION FOR EXCHANGE OF LANDS—ADMISSION OF DEDICATION.—A petition by the owner of land granted by the authorities of a pueblo, praying for "an exchange or indemnification for certain lands belonging to her, and now occupied by the public, being the lot at the entrance of Negro Alley into the public square," is not an admission of a dedication to the public of the land sought to be exchanged; and the action of the city council directing a concession to be made to her of other land is not consistent with a claim that the land proposed to be exchanged then belonged to the city.—*Id.*

14. CONCESSION OF EXCHANGE—FAILURE OF CONSUMMATION—NON-DELIVERY OF DEED—RECONVEYANCE BY CITY.—The action of the city council directing a concession to be made to the owner of the other land, in accordance with which a deed was drawn up and signed by the mayor conveying a certain lot, is not sufficient evidence of the consummation of the exchange contemplated, there being no proof of the delivery of the deed, and it appearing that the lot so deeded was subsequently conveyed by the city to a third person.—*Id.*

15. ACT TO QUIET LAND TITLES—MEXICAN GRANT—PATENT—EJECTMENT—EVIDENCE.—A patent issued by the United States under the act of Congress of July 23, 1866, to quiet land titles in California, to a *bona fide* purchaser of lands within the exterior boundaries of a Mexican grant, which were excluded from the final survey, is *prima facie* evidence of a right in the patentee to recover the lands patented in an action of ejectment, and is conclusive, unless it can be successfully impeached by the defendants.—*Shanklin* v. *McNamara*, 371.

16. IMPEACHMENT OF PATENT—EVIDENCE—SWAMP AND OVERFLOWED LAND—CERTIFICATES OF PURCHASE.—The patent so issued cannot be impeached by evidence that the land patented was swamp and overflowed land, notwithstanding the defendants hold a certificate of purchase thereof from the state, and it is not error to exclude such evidence.—*Id.*

17. SWAMP-LAND IN MEXICAN GRANT—CONSTRUCTION OF ACT OF 1850.—Though the act of September 28, 1850, operated as a grant of swamplands to the state *in præsenti*, it was not the intention of Congress to grant thereby to the state of California swamp-lands lying within the exterior boundaries of a Mexican grant though such lands were finally excluded from the survey.—*Id.*

18. ACTION OF LAND DEPARTMENT—CONTEST—ADJUDICATION OF FACTS.—The decision of the land department of the United States upon question of fact coming before it upon a contest of the right to enter and purchase lands from the United States is conclusive upon the parties before it and those claiming under them, if the decision is free from fraud and fraudulent imposition.—*Id.*

19. FRAUD—COLLATERAL ATTACK—RELIEF IN EQUITY.—Fraud or fraudulent imposition upon the land department in the obtaining of a patent cannot be set up by way of collateral attack upon the patent in an action of ejectment brought by the patentee, and the patent can only be assailed on these grounds by a proceeding in equity.—*Id.*

PUBLIC LANDS (Continued.)

20. ESTOPPEL OF STATE AND ITS GRANTEE—QUALIFICATIONS OF PATENTEE—LOCATION WITHIN MEXICAN GRANT—CHARACTER OF LAND.—If the state is a party to a contest before the land department in respect to the entry and purchase of lands from the United States by a purchaser from a Mexican grantee under the act of 1866, both the state and its grantees are bound by the decision of the land department as to the qualification of the purchaser, and that the land was within the exterior boundaries of a Mexican grant, and also as to the character of the land as not being swamp and overflowed, provided its character was distinctly adjudged by the decision.—*Id.*

21. INSUFFICIENT DECISION AS TO CHARACTER OF LAND.—Where the language of the decision of the land department as to whether the land was or was not swamp and overflowed is indefinite and ambiguous, and does not distinctly adjudicate the character of the land, it cannot be regarded as determining that it was not swamp and overflowed, notwithstanding a patent was awarded to a purchaser from a Mexican grantee under the act of 1866.—*Id.*

22. JURISDICTION OF LAND DEPARTMENT — LAND PREVIOUSLY GRANTED.—The land department of the United States cannot grant land; and it is not within its power to award to one person land which by an act of Congress has been previously granted to another, and its decision so awarding it is a nullity, and passes no title.—*Id.*

23. MEXICAN GRANT — EXTERIOR BOUNDARIES—RIGHT OF POSSESSION.—The grantee of a Mexican grant of a smaller quantity of land to be selected within a larger area is entitled to the possession of all the land within the exterior boundaries of the grant until the specific quantity granted is set off by a final survey; and this right of possession is property, full protection of which was guaranteed by the treaty of Guadaloupe Hidalgo, and by the constitution and laws of the United States.—*Id.*

24. SWAMP AND OVERFLOWED LANDS — DELAY IN DETERMINING CHARACTER OF LAND—EVIDENCE.—Where the land in controversy was surveyed in 1869, and never returned, certified or listed to the state as swamp-land, and was patented in 1882 by the United States to a *bona fide* purchaser from a Mexican grantee, pursuant to the act of Congress of 1866, the delay of a swamp-land claimant under a certificate of purchase from the state issued in 1856 to have any steps taken to have the character of the land determined, as provided by said act, is strongly persuasive, though not conclusive, evidence that the land was never swamp and overflowed.—*Id.*

25. TIDE-LANDS—CERTIFICATE OF PURCHASE — PATENT — CURATIVE ACT—CASE AFFIRMED.—A certificate of purchase of tide-lands, issued prior to the curative act of March 27, 1872, was validated by that act, and a patent from the state for such lands, issued subsequent to the passage of that act, and pursuant to the prior certificate, vests title in the patentee. (*Upham* v. *Hosking*, 62 Cal. 250, affirmed.)—*Northern R'y Co.* v. *Jordan*, 23.

PUBLIC OFFICERS.

1. OFFICE—VACANCY—APPOINTMENT BY GOVERNOR.—An appointment by the governor, during a recess of the legislature, for a term of four years, to fill a vacancy in the membership of the state board of health, is in legal effect merely an appointment during the recess of the legislature, and until the adjournment of its next session.—*People ex rel. Laine* v. *Tyrrell*, 475.
2. CONFIRMATION OF SENATE.—Upon the issuance of a commission to fill a vacancy, the appointment is complete, and needs no action of the senate to confirm it.—*Id.*
3. HOLDING OVER—QUALIFICATION OF SUCCESSOR—CONSTRUCTION OF POLITICAL CODE.—Section 879 of the Political Code, declaring that every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified, applies to officers appointed temporarily by the governor to fill a vacancy.—*Id.*
4. EXPIRATION OF TERM—POWER OF GOVERNOR.—The mere expiration of the term of the incumbent of an office does not create a vacancy such as the governor alone is authorized to fill by the appointment of a successor.—*Id.*
5. APPOINTMENT WITH CONSENT OF SENATE — COMMISSION.—In the matter of an executive appointment with the consent of the senate, the issuance of a commission is a part of the act of appointment.—*Id.*
6. QUALIFICATION—CREATION OF VACANCY.—An appointee is not required to qualify until he has received his commission, and his failure to qualify cannot create a vacancy if he has received no commission.—*Id.*
7. POLICE-OFFICER — PAYMENT INTO INSURANCE FUND — VESTED RIGHT—CONTINGENCY.—A police-officer of the city and county of San Francisco has no vested right to the sum paid by him into the insurance fund created under the act of April 1, 1878 (Stats. 1878, p. 879), except upon the happening of the contingencies mentioned in the act.—*Clark* v. *Reis*, 543.
8. DISMISSAL OF OFFICER—REPAYMENT — MANDAMUS — INSUFFICIENT PETITION.—The police-officer, upon his dismissal from the force, is not entitled to a *mandamus* to compel repayment of the sum paid by him into the insurance fund, if the petition is insufficient to bring him within any of the contingencies of the statute which he invokes.—*Id.*
9. CONSTITUTIONAL LAW—OFFICERS—INCREASE OF SALARY—INCIDENTAL EXPENSES.—Section 9 of article 11 of the constitution, forbidding the compensation of any county, city, town, or municipal officer from being increased after his election or during his term of office, only applies to the compensation for services to be rendered, and does not forbid an allowance for the incidental expenses of the office, to be determined by the necessity which the business of the office may develop.—*Kirkwood* v. *Soto*, 394.
10. COUNTY GOVERNMENT ACT—AMENDMENT OF POLITICAL CODE—TRAVELING EXPENSES OF COUNTY SUPERINTENDENT OF SCHOOLS. —The County Government Act fixing a salary for county superintendents of schools "as compensation for the services required of them by law, or by virtue of their office," does

PUBLIC OFFICERS (Continued).

not prevent the application of the amendment of section 1552 of the Political Code, made in March, 1889, allowing each county superintendent his traveling expenses, and other incidental expenses connected with the office, to a county superintendent holding office at the time of the amendment.—*Id.*

See MUNICIPAL CORPORATIONS, 7, 8.

PUEBLO LANDS. See PUBLIC LANDS.

QUIETING TITLE.

1. BURDEN OF PROOF.—In an action to quiet title, the burden rests upon the plaintiff to show title in himself, and if he fails to make out a case, he is not entitled to recover.—*Winter* v. *McMillan*, 256.
2. CROSS-COMPLAINT — EQUITABLE TITLE.—A cross-complaint is proper in an action to quiet title, when it seeks to enforce an equitable title against the plaintiff as the holder of the legal title.—*Id.*
3. EXECUTION SALE OF BENEFICIAL INTEREST—PLEADING.—Where the defendant in an action to quiet title has acquired the beneficial interest of the owner of the equitable title, by an execution sale, he is entitled to have it adjudged to him in the action; but in order to have it so adjudged, he must state the facts as fully in his cross-complaint as they should be stated in a bill in equity.—*Id.*
4. FAILURE TO ANSWER CROSS-COMPLAINT—HOMESTEAD—WAIVER.—In such action, evidence that the plaintiff's grantors had declared a homestead on the property is inadmissible, where the grantors have, by failure to answer the cross-complaint, waived any claim under the homestead declaration.—*Id.*
5. LIEN OF PLAINTIFF—TESTING VALIDITY BY CROSS-COMPLAINT.—Where the plaintiff alleges title in himself he cannot recover by showing simply a lien without possession or right of possession; but the defendant may, by cross-complaint, test the validity of a lien claimed by the plaintiff, if he alleges that the property which he has purchased at execution sale was conveyed to the plaintiff by the execution debtor merely to secure him against liability on a bond, and that no liability was incurred by plaintiff.—*Id.*
6. PARTIES—BENEFICIARY IN POSSESSION—EXECUTION SALE.—The defendant may, by his cross-complaint, bring in whatever parties are necessary to determination of the controversy; and where the defendant claims under an execution sale of the interest of a beneficiary in possession, for whose benefit the plaintiff holds the legal title, such beneficiary is a proper and necessary party, and may be brought in by the cross-complaint.—*Id.*
7. ACTION BY VENDOR — RETURN OF DEPOSIT — RIGHTS OF PURCHASER.—Where the purchaser of land pays a deposit on account of the sale, under an agreement with the vendor, by which he was to have the deposit returned to him if the title should not be satisfactory, and it appears that the purchaser is entitled to a return of the deposit, the vendor cannot have his title quieted against the purchaser until he first restores the money received.—*Benson* v. *Shotwell*, 42

QUIETING TITLE (Continued).

8. ACTION TO QUIET TITLE—EQUITY—MAXIM.—An action to quiet title is in the nature of a suit in equity, and relief therein is subject to the maxim that he who asks equity must do equity.—*Id.*

9. RESCISSION OF CONTRACT—RESTORATION OF MONEY RECEIVED.—Where the plaintiff in an action to quiet title, if he had brought an action to rescind a contract with the defendant, would not have been entitled to that relief until he had restored all that he had received under the contract, he cannot avoid this obligation by coming into equity to quiet his title.—*Id.*

See JUDGMENT, 3, 8.

RAILROADS. See NEGLIGENCE, 1, 6.

RECEIVER. See CONTEMPT; MORTGAGE, 3-7.

REHEARING. See APPEAL, 22.

REPLEVIN. See CLAIM AND DELIVERY.

RESCISSION. See FRAUD, 3.

RIPARIAN RIGHTS. See WATER AND WATER RIGHTS.

SALE.

CONTRACT—ACCEPTANCE OF GOODS—WAIVER OF DEFECT.—If a party accepts and pays for part of a quantity of goods delivered under a contract, without reserving the right to object subsequently, and does not offer to return the goods delivered, but retains them, he waives any defect in their quality, and he cannot make such defects a ground of objection to goods which are to be subsequently delivered, and which are in accordance with the contract.—*Guernsey* v. *West Coast Lumber Co.*, 249.

See AGENCY, 8-20; VENDOR AND PURCHASER.

SAN FRANCISCO. See PUBLIC LANDS, 1-9.

SCHOOLS. See MANDAMUS, 3-5.

SPECIFIC PERFORMANCE. See EASEMENT, 2; LANDLORD AND TENANT, 7; VENDOR AND PURCHASER, 16.

STATUTE OF FRAUDS. See AGENCY, 6, 7; EASEMENT, 2; VENDOR AND PURCHASER, 2.

STATUTE OF LIMITATIONS. See BANKS, 3.

STATUTES.

REPEAL BY IMPLICATION.—Whether a general statute repeals a special one by implication in a question of intention, to be gathered from the language used, and from the subject-matter of legislation.—*McGivney* v. *Pierce*, 124.

STOCKHOLDERS. See CORPORATION, 1-3.

STREET ASSESSMENT.

1. VALIDITY—NEW ASSESSMENT.—If a street assessment is valid, the superintendent of streets cannot be required to make another assessment.—*Frick* v. *Morford*, 576.
2. MANDAMUS—PLEADING—APPLICATION.—An application by contractors for street work for a *mandamus* to compel the superintendent of streets to make a new assessment for the work, which alleges that payment of the previous assessment was refused because of excess of work, must clearly set forth facts showing that the previous assessment was void, else the writ should be refused.—*Id.*
3. EXCESS OF STREET WORK—ERRONEOUS PLANS AND SPECIFICATIONS—WORK OUTSIDE OF LIMITS.—Street work done according to the plans and specifications in the office of the city surveyor, which call for work outside of the limits authorized by the resolution of intention, is done without authority as to the work outside of those limits, and the contractors are not entitled to an assessment for the excess.—*Id.*
4. LOCATION OF LOT ASSESSED.—If the lot assessed wholly fronts upon the work done in excess of authority, it cannot be held liable for any assessment; but if it fronts in whole or in part upon work authorized by the resolution of intention, the assessment against it will not necessarily be rendered void by the fact that the entire assessment purports to make a charge upon lots not within the limits fixed by the resolution of intention.—*Id.*
5. SEGREGATION OF EXCESS.—An excess of work done outside of the limits fixed by the resolution of intention will not invalidate an assessment against lots within those limits for work which was authorized by the resolution, if the cost of the work was estimated by the linear foot, so that the cost of the excess can be easily segregated from the cost of the remainder.—*Id.*
6. EXCESS OF WORK WITHIN PROPER LIMITS — APPEAL TO CITY COUNCIL.—An assessment for street work embracing only the frontage covered by the resolution of intention, but including the expense of an excess of work done in accordance with the specifications, but not authorized by the resolution, may be corrected by appeal to the city council, and the failure to take such appeal is conclusive upon the owner as well as the contractor.—*Id.*
7. LOT IMPROPERLY ASSESSED—APPEAL BY CONTRACTOR.—If a lot improperly assessed is partly within and partly without the limits of the work authorized by the resolution of intention, it is the duty of the contractor, under section 11 of the act of March 8, 1885, to appeal to the city council to have the assessment corrected, and upon his failure to take such appeal he is concluded, and cannot have the assessment corrected in any other mode.—*Id.*
8. APPEAL BY OWNER.—An illegal assessment creates no lien upon the land assessed, and the owner thereof is not a person "aggrieved," and is not required to appeal to the city council.—*Id.*

STREET ASSESSMENT (Continued).

9. FORECLOSURE OF LIEN—NECESSARY PARTIES.—In an action to foreclose a street assessment upon a specific tract of land in the city and county of San Francisco, under the act of 1871–72, all of the owners of the property assessed must be made parties defendant, and the lien cannot be enforced against any of the owners, in the absence of another owner who is not joined as a defendant.—*Robinson* v. *Merrill*, 11.

10. BURDEN OF PROOF—PLEADING—ISSUE AS TO OWNERSHIP—NEW MATTER.—The burden of proof that the defendants sued in such action are the owners of the land is upon the plaintiff, where such ownership is denied by the defendants; and an answer alleging that another person, not sued, owns an undivided interest in the land is in legal effect merely a denial of the averment of the complaint as to ownership by the defendants, and is not an averment of new matter casting the burden of proof upon the defendants.—*Id.*

11. STREET IMPROVEMENT—ASSESSMENT—LIEN UPON LOTS—FORECLOSURE—SEVERAL RIGHT OF ACTION—FORMER RECOVERY—PLEA IN BAR.—Under the act of March 18, 1885, (Stats. 1885, p. 147), providing for the assessment of abutting lots for the expenses incurred for street improvements, and that the amount assessed upon each lot shall be a lien thereon, each lot or portion of a lot is separately liable for its proportion of the cost of the improvement, and the liability of each is independent of any other, and constitutes a separate demand upon which a separate cause of action may be based, and the foreclosure of a lien upon one lot is not a bar to an action to foreclose a lien upon another lot owned by the same person.—*Gillis* v. *Cleveland*, 214.

12. PERSONAL LIABILITY.—The expense of the improvement is a lien upon the property benefited, and not a charge against the owner personally.—*Id.*

13. ATTORNEY'S FEES — ALLOWANCE AGAINST EACH LOT.—Under section 12 of such act, allowing a certain amount as an attorney's fee, in addition to the taxable costs, in all cases of recovery under the provisions of the statute, the fee may be allowed as against each lot, although owned by the same person.—*Id.*

14. RECORD OF WARRANT OF ASSESSMENT.—A warrant of assessment must, in order to create a lien upon the property charged, be recorded in the office of the superintendent of streets before it is delivered to the contractor or his assigns.—*Id.*

15. OMISSION OF NAME OF MAYOR FROM RECORD.—Where the warrant of assessment was properly signed by the superintendent of streets, and countersigned by the mayor, the fact that the name of the mayor and the designation of his office were omitted from the record by the superintendent does not render the recording ineffectual.—*Id.*

16. JURISDICTION—ADJUDICATION OF JURISDICTIONAL FACT—JUDICIAL ACTION OF SUPERVISORS—PETITION FOR GRADING OF STREET —MAJORITY OF FRONTAGE.—The rule that whenever the jurisdiction of a court not of record depends on a fact which the court is required to ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is con-

STREET ASSESSMENT (Continued).

clusive, and not subject to any collateral attack, applies to the judicial action of a board of supervisors upon a petition for the grading of a street in deciding that a majority of the frontage of lots on the street where the work was proposed to be done was represented in the petition for the work.—*Spaulding* v. *North San Francisco Homestead etc. Association*, 40.

17. ACTION FOR STREET ASSESSMENT IN SAN FRANCISCO—EVIDENCE.—In an action to recover an assessment for the grading of a street under the act of April 1, 1872, relating to street-work in San Francisco, which provides that no grading can be ordered by the supervisors unless a majority of the frontage of the lots shall be represented in the petition requesting the work, where the petition under which the grading was done did not show whether the petitioner owned a majority of the whole frontage or not, evidence that the petitioner was not the owner of more than one half of such frontage is inadmissible.—*Id.*

18. FAILURE TO REMONSTRATE—WAIVER OF OBJECTION TO GRADING—COLLATERAL ATTACK UPON DECISION OF SUPERVISORS.—An owner of land on such street who fails to file the remonstrance required by the act waives all objections to the form and granting of the petition, and the decision of the board in ordering the grading to be done is conclusive as against collateral attack in an action to recover the assessment.—*Id.*

19. GRADING OF SEVERAL BLOCKS — PREVIOUS GRADING OF CROSS-STREETS.—The fact that the portion of the street sought to be improved had been divided into two separate parts by a cross-street, which had been previously graded, does not invalidate the assessment, as the whole of the street might have been graded, and the blocks divided by cross-streets included in one petition and assessment.—*Id.*

20. LETTING SECOND CONTRACT FOR INCREASED PRICE—PRESUMPTION OF REGULARITY.—Where the contract to grade the street was entered into for a certain sum per cubic yard, and afterwards, without any request of the contractor, another resolution of intention was published, resulting in a second contract with the same contractor, for a larger sum per cubic yard, and no reason appears for letting the second contract, it will be presumed that the board acted regularly in effecting the second contract, and that a valid and sufficient reason existed for its action, and an assessment against the owners is not thereby invalidated.—*Id.*

21. REMEDY FOR OBJECTION TO SECOND CONTRACT—APPEAL TO SUPERVISORS.—The remedy for any objection by a land-owner to the letting of a second contract for the grading of a street for an increased price, while a previous contract was in force, is by an appeal to the board of supervisors, under section 12 of the act of April 1, 1872, and not by defense to an action to recover the assessment under the second contract. —*Id.*

STREETS AND HIGHWAYS.

1. MUNICIPAL ORDINANCE—REGULATION OF STREETS—OBSTRUCTION OF SIDEWALK—CONSTITUTIONAL LAW.—An ordinance of the

STREETS AND HIGHWAYS (Continued).

city of San José forbidding the obstruction of a sidewalk, and prescribing a penalty for refusal to remove the obstruction upon notice prescribed to be given by certain municipal authorities, such penalty being of the same character, though less in degree, as that prescribed by the general law, is valid, and not in conflict with the constitution or with the general law.—*Ex parte Taylor*, 91.

2. LEGALIZATION OF OBSTRUCTION — REVOCATION OF AUTHORITY—PUBLIC OFFENSE.—Municipal corporation may legalize a partial obstruction of street or sidewalk which would otherwise be a public nuisance; but when it changes its ordinance so as to revoke the authority, and declare the obstruction unlawful, the obstruction is no longer legal, and the continuation of it thereafter constitutes a public offiense, for which the party persisting therein is amenable to law.—*Id.*

3. HABEAS CORPUS—JURISDICTION OF JUSTICE'S COURT.—When the complaint for the violation of a municipal ordinance states facts which constitute a public offense, both under the ordinance and under the general statute, and both the offense and the penalty are within the jurisdiction of the justice's court, and the judgment is not in excess of that authorized by the general statute, the prisoner committed for such offense cannot be discharged on *habeas corpus*, whether the ordinance is valid or not.—*Id.*

4. PRESCRIPTION—OBSTRUCTION OF SIDEWALK.—No right can be acquired by prescription to maintain an obstruction to a sidewalk in a street of a town or city.—*Id.*

5. EMINENT DOMAIN—COMPENSATION—USE OF STREETS—DEDICATION—STREET-RAILWAY.—The dedication of a street to public use authorizes any ordinary use for street purposes; and the use of a street for the tracks of a street-car company is of this class, and may be authorized by the city authorities, without compensation to the owner of the fee of the street.—*Finch* v. *Riverside and Arlington R'y Co.*, 597.

6. STREET-CAR COMPANY — POSITION OF TRACK — FRANCHISE—EJECTMENT.—The tracks of a street-car company should be laid as nearly as practicable in the middle of the street. If the franchise does not indicate the precise position of the track, and it is not as nearly as practicable to the middle of the street, the track is an unauthorized obstruction, and the owner of the fee of the street may maintain ejectment against the company.—*Id.*

7. PUBLIC CONVENIENCE.—The mere fact that it is more convenient to the traveling public to have the track on the side of the street, and that it obstructs travel a little less than it would do in the center of the street, is not a sufficient reason for not complying with the law.—*Id.*

See DEDICATION, 1, 4.

SUMMONS. See GUARDIAN AND WARD, 2.

SUPREME COURT. See BILL OF EXCEPTIONS.

SURETY. See NEGOTIABLE INSTRUMENTS.

SURVEY. See BOUNDARY, 3, 4.

SWAMP AND OVERFLOWED LANDS. See PUBLIC LANDS.

TAXATION.

1. TAXES—REASSESSMENT—POLITICAL CODE.—Section 3649 of the Political Code, providing for the reassessment of property which has "escaped assessment" in the preceding year, is not unconstitutional.—*City of San Luis Obispo* v. *Pettit*, 499.
2. WORD "ASSESSMENT."—The word "assessment," as used in said section, means a valid assessment.—*Id.*
3. ASSESSMENT—VALIDITY—COMPLIANCE WITH STATUTE—MONEY PAID INTO COURT.—An assessment which is not made as prescribed by the statute is invalid. Therefore, if the statute requires money paid into court and deposited with the county treasurer to be assessed to such treasurer, and it is assessed to the plaintiff in the suit, the assessment is invalid.—*Id.*
4. MUNICIPAL CORPORATION ACT—TIME OF ASSESSMENT — ADOPTION OF SYSTEM BY CITY COUNCIL.—Section 871 of the municipal corporation act, which provides that the city council may adopt a system for the assessment, levy, and collection of taxes, which shall conform to the general laws of the state as nearly as circumstances will permit, "except as to the times for such assessment, levy, and collection," does not forbid the council from selecting the time fixed for the other taxes. It simply leaves the selection of the time to the discretion of the council.—*Id.*
5. MEANING OF WORDS "ASSESSING AND COLLECTING."—The words "assessing and collecting" may be so used as to include the operation called the levy of the tax.—*Id.*
6. MUNICIPAL ORDINANCE—ADOPTION OF SECTIONS OF CODE BY REFERENCE TO THEIR NUMBER.—An ordinance passed in pursuance of section 871 of the municipal corporation act may adopt certain sections of the Political Code by reference to their number.—*Id.*
7. ORDINANCE—INVALIDITY OF PART.—If part of an ordinance is invalid, but is distinctly separable from the remainder, such remainder may stand, and the invalid portion may be rejected.—*Id.*

TIME. See APPEAL, 18.

TITLE. See MANDAMUS, 1-6; VENDOR AND PURCHASER.

TORTS. See EXECUTION, 1; INJUNCTION; PLEADING, 14.

TRUST.

1. DEED OF INFANT—DISAFFIRMANCE.—An infant cannot avoid or disaffirm a deed made by him in execution of a trust, which a court of equity would have compelled him to perform, notwithstanding his infancy.—*Nordholt* v. *Nordholt*, 552.
2. CONSTRUCTIVE TRUST—FRAUD—PAROL EVIDENCE.—A constructive trust, arising from fraud, is not within the statute of frauds, and may be proved by parol evidence.—*Id.*
3. CONVEYANCE UNDER PAROL PROMISE TO RECONVEY—INTENTION TO DEFRAUD.—A constructive trust arises, and will be enforced in equity, where a minor procures land to be con-

TRUST (Continued).

veyed to himself by his mother under an express promise that he will reconvey it to his brother when arriving at age, with the intention not to perform the promise, and to claim and hold the property absolutely in his own right after arriving at age.—*Id.*

4. EXECUTION OF TRUST—DEED—DURESS—PLEADING.—If a trust is executed by a deed made in pursuance thereof, the execution of which is admitted, it cannot be proved that it was made under duress, unless the duress is specially pleaded as affirmative matter in avoidance of the deed.—*Id.*

See ASSIGNMENT FOR BENEFIT OF CREDITORS; PLEADING, 5, 6; PUBLIC LANDS, 1–9.

VENDOR AND PURCHASER.

1. CONTRACT OF SALE—RETURN OF DEPOSIT—OPTION OF PURCHASER—CONSTRUCTION OF CONTRACT.—A memorandum signed by a vendor, acknowledging the receipt of a certain sum of money as a deposit on account of the sale of certain land therein described, for a price fixed, and providing that the sale should be null and void, and that the deposit should be returned in case the title did not prove satisfactory to the purchaser, is a valid contract for the purchase and sale of the land, and not a mere sale of an option to the purchaser to buy the land.—*Benson* v. *Shotwell*, 49.
2. STATUTE OF FRAUDS—ACCEPTANCE OF PURCHASER.—The memorandum will bind the vendor if signed by him, though not signed by the purchaser, and the payment of the deposit by the purchaser is a sufficient acceptance by him of the terms of the contract.—*Id.*
3. LIEN OF PURCHASER FOR AMOUNT OF DEPOSIT.—The purchaser has a lien upon the property, for the amount of the deposit, in case of failure of the vendor to make good his part of the contract, unless the vendee is himself first in default.—*Id.*
4. ABSTRACT OF TITLE—MISNOMER OF GRANTOR—INSUFFICIENT TITLE OF RECORD.—Where the abstract of title showed that the title of record came into "H. P. Hepburn," and there was no deed from him, but the next deed of record was from "H. P. Hopkins," and the vendor claimed that the record was wrong, and that the deed purporting to be from Hopkins was in fact from Hepburn, but refused to submit his proof for examination of the purchaser or permit the deed to be recorded correctly, a good title is not shown, and the purchaser is justified in refusing to buy the land, and may claim return of the deposit, even though it may be afterward proved that the title was good.—*Id.*
5. SATISFACTORY TITLE—PRESCRIPTION.—Under an agreement for the purchase of land on condition that title would be satisfactory to the purchaser, the purchaser is entitled to a good paper title of record, which is sufficient in law, and is not bound to accept a title resting upon the statute of limitations, or to take the risk of determining, from facts *dehors* the record, whether or not an adverse claim is barred by limitation.—*Id.*

VENDOR AND PURCHASER (Continued).

6. CONTRACT FOR POSSESSION—CONSTRUCTION — ACTUAL POSSESSION—ATTORNMENT OF TENANTS—INCOMPLETE POSSESSION.—Where the agreement for the sale of land provided that possession would be given and guaranteed to the purchaser, the purchaser is entitled to an actual *possessio pedis* of the whole land, and constructive possession by attornment of tenants is not sufficient; and where it appears that the tenants refused to give possession, and several of the houses were locked up and the occupants absent, and that an adverse right had grown up as to part of the land, the promise by several of the tenants to attorn to the purchaser does not constitute the delivery of possession required by the contract.—*Id.*
7. ASSIGNMENT OF PRIOR RENT—ENCUMBRANCES—TENANCY.—The fact that the contract of sale provided that the purchaser should be entitled to rent from a day anterior to the date of the contract does not bind the purchaser to take the lot subject to encumbrances, or to the right of possession of tenants at the time of final completion of the terms of the agreement, nor modify a provision in the contract for delivery of possession.—*Id.*
8. CONCURRENT CONDITIONS.—Where by the terms of the contract the delivery of possession and transfer of title by the vendor, and payment of purchase-money by the purchaser, were to be simultaneous and concurrent, the conditions are mutual and dependent, and the vendor is not entitled to demand the purchase-money until delivery of possession.—*Id.*
9. CONTRACT OF SALE—EXECUTION—FINDINGS—EXHIBIT—SURPLUSAGE.—If a contract for the purchase of land is set out *in hæc verba* in the complaint, a finding that the vendor entered into an agreement in writing with the vendee for the sale of the land upon the terms and conditions set forth in the complaint is a sufficient finding that the vendee executed the contract; and a further reference in the findings, to an exhibit which is not made a part of the pleadings, findings, or record, may be rejected as surplusage.—*Smith* v. *Mohn*, 489.
10. FINDINGS—AMOUNT DUE UPON CONTRACT.—A finding of the amount due the vendor upon the contract is sufficient, without stating that it was due from the vendee, where the vendor and vendee are the only parties who signed the contract.—*Id.*
11. FRAUD—PURCHASE BY THIRD PARTY—AFFIRMATIVE DEFENSE—SUFFICIENCY OF FINDINGS.—Affirmative matter, alleged in the answer, that the vendee's signature to the contract was obtained by fraud, and that a third party was the purchaser and the real party in interest, and was so accepted and regarded by the vendor, is sufficiently met and covered by a finding that the signature was not obtained by fraud, and that the vendor did not accept and receive the contract with knowledge and notice that the third party was the real purchaser.—*Id.*
12. PLEADING—PERFORMANCE OF CONDITIONS PRECEDENT.—An averment that the vendor duly performed all of the conditions of the contract to be performed by him up to the time of bringing suit is a sufficient averment of the performance of conditions precedent.—*Id.*

VENDOR AND PURCHASER (Continued).

13. TIME OF ESSENCE OF CONTRACT—DEFAULT OF VENDEE—ACTION FOR PURCHASE-MONEY.—Under a contract for the sale of land, providing that time shall be of its essence and that a failure on the part of the vendee to comply with its terms shall forfeit all his rights thereunder, the failure of the vendee to make the payments provided for does not make the contract void as to the vendor, and he may, upon default of the vendee, enforce the contract, and sue for the amount of purchase-money due.—*Id.*

14. CONTRACT OF SALE—TIME, WHEN OF ESSENCE OF CONTRACT.—A stipulation in a contract for the conveyance of land, to the effect that the vendor would convey within sixty days from the date thereof upon condition that the final payment of the purchase-money should be made within said time, otherwise the "agreement to be null and void," shows a clear intention to make time the essence of the contract; and a failure by the vendees or their assignees to make the payment due, within the time fixed, avoids the contract.—*Martin* v. *Morgan*, 203.

15. INTENTION OF PARTIES—PROVISION AVOIDING CONTRACT.—The intention of the parties to make time the essence of a contract must govern, and no particular form of stipulation is necessary, but any clauses will have that effect which clearly and absolutely provides that the contract is to be void, if the fulfillment is not within the prescribed time.—*Id.*

16. UNILATERAL CONTRACT—POSSESSION OF VENDEE—SPECIFIC PERFORMANCE—FAILURE TO TENDER PURCHASE-MONEY IN TIME LIMITED.—When time is made of the essence of a unilateral contract to convey land upon payment of the purchase-money within a definite period, the fact that the vendee entered into possession of the land, plowed, surveyed, and platted it into lots, without making any other improvements thereon, will not entitle him to a specific performance of the contract, if he has failed to tender the purchase-money within the time limited.—*Id.*

17. CONTRACT OF SALE—TIME OF ESSENCE.—Time is of the essence of a contract for the sale of land, which provides that the consideration is to be paid in installments at stated times, that a good and sufficient deed is to be delivered upon receiving the payments at the times and manner agreed upon, and that in the event of a failure to comply with the terms of the contract by the vendees, the vendor is to be released from all obligations to convey the property, and the vendees are are to forfeit all rights thereto.—*Woodruff* v. *Semi-Tropic Land and Water Co.*, 275.

18. DEFAULT OF VENDOR—DEMAND—OFFER OF PERFORMANCE—RESCISSION BY VENDEES—RECOVERY OF PURCHASE-MONEY.—Where time is of the essence of the contract, and the vendor fails and neglects to execute the conveyance required by the contract after demand therefor, and an offer in writing by the vendees to pay the last installment of purchase-money, the vendees may rescind the contract, tender a reconveyance of their rights to the vendor, and surrender the possession, and demand and recover back the installments of purchase-money paid.—*Id.*

19. SUBSEQUENT OFFER OF VENDOR TO PERFORM.—After the vendees

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have rescinded the contract for the default of the vendor, and tendered restitution, and demanded a repayment of the installments of purchase-money paid, no subsequent offer of performance on the part of the vendor will relieve him from the effect of his default; and the vendees are not bound to accept an offer of performance made by the vendor after suit brought for the recovery of the purchase-money, and before service of the summons therein.—*Id.*

20. CONTRACT OF SALE—CONSTRUCTION—USE OF PRINTED BLANK — When a printed blank is used in a contract for the sale of land, if there is any doubt about how the contract is to be construed, and words found in the printed part are repugnant to the general scope and purpose of the contract, as the same appears from the original or written parts thereof, the latter must control.—*Vorwerk* v. *Nolte*, 236.

21. CONTRACT MAKING TIME OF ESSENCE—PAYMENTS OF PURCHASE-MONEY—CONVEYANCE AT FUTURE TIME.—When the provision that "time is of the essence of the contract" is used in a contract of sale with reference to payments of purchase-money, its object is to protect the vendor against delays in future payments, and it has no application where the price is already fully paid, and nothing remains to be done but to make the conveyance; and if such provision is contained in a printed form used in making the contract, it will not be construed to apply to the written promise of the vendor to execute a deed within one year.—*Id.*

22. VENDEE IN POSSESSION—TENDER OF DEED AFTER TIME LIMITED —RECOVERY OF PURCHASE-MONEY.—When the vendee remains in possession and receives the rents and profits after the time limited for the tender of a deed, he cannot avail himself of a promise of the vendor to return the purchase-money, with three per cent per month interest thereon, if he should fail to deliver a deed within one year, if a deed conveying good title is tendered within three days after a demand made therefor, and within eight days after the expiration of the year.—*Id.*

23. CONTRACT OF SALE—FORFEITURE — RESCISSION — RECOVERY OF PURCHASE-MONEY.—Where a contract for the sale of land provided for a forfeiture of all right to a conveyance, and that the purchase-money paid should be as liquidated damages, in case of non-fulfillment of the terms of future payment by the purchaser, and it appears that full payment of the residue of the purchase-money was tendered and a deed demanded ten months after maturity, and that the vendors refused to accept the tender, or to return the purchase-money paid, and elected to rescind the agreement, the purchaser may maintain an action to recover from the vendors the installment of purchase-money paid.—*Drew* v. *Pedlar*, 443.

24. ACTION TO RECOVER PURCHASE-MONEY—PLEADING—ELECTION OF VENDOR TO RESCIND—RECOUPMENT OF DAMAGES—JUDGMENT ON PLEADINGS.—If in such action the vendors do not deny the allegation of the complaint that they elected to rescind the contract upon the breach thereof by the plaintiff, and do not seek to recoup any actual damages for the breach from the amount of the purchase-money received, or deny any material averments of the complaint, the plaintiff is entitled

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to judgment on the pleadings for the recovery of the sum paid to the vendors.—*Id.*

25. LIQUIDATED DAMAGES—VOID STIPULATION—CONSTRUCTION OF CODE.—The stipulation in the contract that the purchase-money paid should be taken as liquidated damages for the breach of the contract by the purchaser is void under section 1670 and 1671 of the Civil Code, it not being impracticable or at all difficult to fix the actual damage to the vendors, the measure of which is definitely fixed by section 3307 of the Civil Code as the excess of the agreed price, if any, over the value of the property to the vendors.—*Id.*

26. JUDGMENT ON PLEADINGS—CROSS-COMPLAINT—CANCELLATION OF CONTRACT.—A cross-complaint by the vendors seeking the cancellation of an unacknowledged and unrecorded contract of sale as a cloud upon their title, and not offering to refund the purchase-money received, does not entitle them to any affirmative relief, other than that given by a judgment on the pleadings in favor of the plaintiff for a recovery of the purchase-money paid, it being conclusively established by the admissions of the pleadings and by the judgment that the agreement had been rescinded and annulled by the parties.—*Id.*

27. PLEADING—DENIAL OF INDEBTEDNESS—CONCLUSION OF LAW.—The denial of indebtedness of the defendants to the plaintiff is a denial of a conclusion of law, and when inconsistent with admitted facts, cannot avail to prevent a judgment for the plaintiff on the pleadings.—*Id.*

28. DEMAND.—No demand before suit is necessary to be made or alleged in the complaint in an action to recover purchase-money paid under a contract of sale which the defendants have elected to rescind.—*Id.*

29. SETTING ASIDE JUDGMENT ON PLEADINGS — DISCRETION — AMENDED ANSWER—DEFAULT OF PLAINTIFF—RESCISSION.—It is not an error or abuse of discretion to refuse to set aside a judgment on the pleadings for the recovery of the purchase-money upon the proffer of an amended answer which does not deny the rescission of the contract of sale, but only shows that the plaintiff was first in default, by refusing to accept the tender of a deed or to pay the purchase-money.—*Id.*

30. CONTRACT OF SALE—SHARING PROFITS OF RESALE—CONSTRUCTION.—A contract for the sale of a farm for a specified sum, and one half of the excess above that sum for which the farm can be resold, does not require an actual resale, in order to fix liability for one half of the profits which might be realized by accepting any *bona fide* offer.—*Pettinger* v. *Fast*, 461.

31. RESALE FOR ADVANCE—AGREEMENT TO RESELL—PLEADING—EVIDENCE.—If an actual resale of the farm for an advance is alleged in the complaint in an action to recover one-half of the excess, such allegation is sufficiently sustained by proof of an agreement of the vendee to resell the farm, for an advance, though no money was paid upon the contract of resale.—*Id.*

32. AMOUNT OF RESALE—RESERVATION OF TIMBER—VARIANCE—FINDING AGAINST EVIDENCE.—If the complaint alleges a resale of the farm for a specified amount, and the proof shows a resale of two thousand dollars less than the amount alleged,

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with a reservation of standing timber of the value of two thousand dollars, the proof is at variance with the allegation of the complaint, and a finding that the amount of resale is as alleged is not sustained by the evidence.—*Id.*

33. RIGHTS OF VENDOR—RECOVERY FOR TIMBER RESERVED—PLEADING.—The vendor's right to recover upon the contract for one half the excess for which the farm can be resold is not limited to the sum agreed to be paid, in case of a resale by the vendee with reservation of timber; but the vendor may recover, in addition to one half the excess in price paid for the farm, one half the market value of the timber reserved, or one half of the net sum for which it may be sold, at his option, though such recovery can only be justified by a complaint showing the facts as they really exist.—*Id.*

34. MONEY HAD AND RECEIVED—CONTRACT OF SALE—PAYMENT OF PURCHASE-MONEY—NONSUIT.—In an action for money had and received, a nonsuit should be granted where the plaintiff's evidence merely shows that the money was paid as part of the purchase price of land under a contract which provided that the money was paid upon the express condition that it was not to be returned, but was to be forfeited unless further payments of the purchase price were made within a definite period.—*Scott* v. *Glenn*, 221.

35. VENDOR AND PURCHASE—CONTRACT OF SALE—AGENCY—RATIFICATION—ESTOPPEL—RECISSION BY PURCHASER.—Where one of the vendors named in the contract of sale signed his own name and that of the other vendor, whose agent he was, and the other vendor ratified the signature, and joined in demanding the purchase-money and in tendering a deed of the land, in compliance with the contract, the latter is estopped from defending against the contract, and the purchaser cannot plead the agent's want of authority as a ground for repudiating the contract and recovering back the purchase-money paid.—*Id.*

36. EXECUTED CONTRACT—RECOVERY OF PURCHASE-MONEY PAID.—An attempt to recover part of the purchase-money paid under the contract of sale is an attempt to undermine an executed contract, and the purchaser cannot invoke, in favor of such action, principles which apply to actions for the enforcement of executory contracts.—*Id.*

See AGENCY, 8–20; FRAUD, 1–3, 16; JUDGMENT, 2.

VENDOR'S LIEN.

1. EQUITY.—A vendor's lien, properly so called, is not the result of any agreement or intention of the parties, but is a simple equity raised by the courts for the benefit of a vendor of real estate after he has parted with the title.—*Avery* v. *Clark*, 619.
2. EXPRESS LIEN.—So long as the title is retained, the vendor has an express lien for the unpaid purchase-money, which exists by virtue of the contract of sale and reservation of the title, and for which equity makes no special provision, but leaves the parties to rely upon their contract.—*Id.*

VENDOR'S LIEN (Continued.)

3. ASSIGNMENT.—The express lien of a vendor who retains the title is capable of assignment and enforcement by his assignee; but the implied lien raised by equity, in favor of a vendor who has parted with the title, is a privilege purely personal to the vendor, and is not assignable even by express contract, nor does it pass to the assignee of the vendee's obligation for the purchase-money.—*Id.*
4. WAIVER—SECURITY FOR PURCHASE-MONEY.—Although it is competent for the vendor to take security for the payment of the purchase price of the land which he has conveyed, and by express agreement not lose the right to resort to his implied lien, yet his taking such security is *prima facie* a waiver of the lien, and in the absence of some agreement to the contrary, the vendee will hold the land discharged from the vendors lien.—*Id.*
5. MORTGAGE—EXPRESS LIEN FOR PURCHASE-MONEY—RELATION.—The fact that a mortgage which the vendor takes at the time of the conveyance is expressed to be for the purchase-money of the land conveyed does not prevent a waiver of the vendor's lien, nor can it have the effect to extend the mortgage lien by relation to the date of the contract of sale.—*Id.*

See PLACE OF TRIAL.

VENUE. See PLACE OF TRIAL.

VERDICT. See CLAIM AND DELIVERY, 1–6; PRACTICE.

WAREHOUSEMAN.

1. MORTGAGE ON GROWING CROPS—STORAGE OF HARVESTED CROP—WAREHOUSE RECEIPT.—The lien of a mortgage on growing crops is not lost by the mortgagee permitting the mortgagor to store the harvested crop in a warehouse, under an agreement between them that it should be stored in the name of the mortgagee, although the property is stored in the name of the mortgagor, against his protest that the warehouse receipt should show that it was stored for the mortgagee.—*Campodonico* v. *Oregon Improvement Co.*, 566.
2. NEGLECT OF WAREHOUSEMAN.—The neglect or refusal of the warehouseman to issue a receipt showing that the property was stored in the warehouse for the mortgagee does not destroy the mortgage lien in favor of an assignee in insolvency of the mortgagor.—*Id.*
3. ASSIGNMENT OF WAREHOUSE RECEIPT — PREFERENCE — INSOLVENCY OF ASSIGNOR.—The assignment of the warehouse receipt to the mortgagee by the mortgagor, on the day of and before the filing of the latter's petition in insolvency, is not void as a preference under section 55 of the Insolvent Act, where the value of the property is less than the debt for which it was mortgaged.—*Id.*
4. EFFECT OF ASSIGNMENT—TITLE TO PROPERTY IN WAREHOUSE—INSOLVENCY OF ASSIGNOR.—The assignment of the warehouse receipt, conceding it to be a transfer of the legal title to the property described in the receipt, is nevertheless valid as

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against an assignee in insolvency of the mortgagor appointed in proceedings subsequently commenced by him on the day of the assignment.—*Id.*

5. CONVERSION BY WAREHOUSEMAN—SALE BY ASSIGNEE IN INSOLVENCY—ACTION BY MORTGAGEE.—The mortgagee of the growing crops, who is also assignee of the warehouse receipt of the harvested crops, may maintain an action for damages for conversion of the crops against the warehouseman, if the latter delivers them to a vendee of the assignee in insolvency. —*Id.*,

WATER AND WATER RIGHTS.

1. RIPARIAN RIGHTS—DIVERSION OF STREAM — RIPARIAN OWNERSHIP—PRE-EMPTION CLAIM—RECEIVER'S RECEIPT—PLEADING—EVIDENCE.—In an action by one riparian owner to enjoin another from diverting water from the stream, where the plaintiff claims the possession of his tract of land as a pre-emptor from the government, for which he holds a receiver's receipt, it is not necessary to allege in his complaint facts showing that the lands were subject to pre-emption, and that he was a qualified pre-emptor, and took the steps necessary to acquire title from the government; but it is sufficient to allege and prove the receiver's receipt, which is *prima facie* evidence that he is rightfully in possession of the tract described therein, and entitled as a riparian owner to protect himself against an unlawful diversion of the waters of the stream.—*Conkling* v. *Pacific Improvement Co.*, 296.
2. ABANDONMENT OF PRE-EMPTION CLAIM—GRANT OF WATER RIGHT—SUBSEQUENT PRE-EMPTION.—An abandonment of a pre-emption claim defeats the right of a person claiming under the pre-emptor as grantee of a right to divert the waters of a stream flowing through the land pre-empted as against a subsequent pre-emptor.—*Id.*
3. ABANDONMENT UPON PURCHASE—PRE-EMPTION BY PURCHASER—FRAUD UPON GRANTEE OF WATER RIGHT.—The fact that a subsequent pre-emptor has purchased the claim of a prior pre-emptor, and that the abandonment of the pre-emption claim was induced by the purchase, does not render the subsequent pre-emption entry of the purchaser fraudulent or illegal; nor can the grantee of a water right claiming under the first pre-emptor be considered as defrauded by the subsequent pre-emption of the land by the purchaser from his grantor.—*Id.*
4. LIMITED RIGHT OF DIVERSION—APPROPRIATION.—Where the defendant has acquired by appropriation a limited right of diversion, and has lost further claim to appropriation by failure to complete the whole diversion called for by his notice of appropriation within a reasonable time, he cannot increase the amount of his diversion thereafter to correspond with his notice of appropriation, to the prejudice of the rights of a riparian owner.—*Id.*
5. INJUNCTION—DIVERSION BY WATER-PIPE—COMPLETION OF PIPE—CONTINUED DIVERSION.—The fact that the unlawful diversion of water had actually taken place before the commencement of a suit to enjoin the diversion, and that a water-pipe of improper size, by which the water was diverted, was

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completed before the filing of an amended complaint seeking to enjoin the diversion of water thereby, constitutes no objection to an injunction to prevent the continued diversion of the water.—*Id.*

6. DAMAGES.—If it appears that the diversion of water from a riparian owner is wrongful, it is not necessary for the plaintiff to prove damages, to entitle him to an injunction.—*Id.*
7. ENJOINING EXCESSIVE DIVERSION.—Where the right of the defendant to divert a certain quantity of water by means of a pipe of a certain size is conceded and established, and it appears that defendant has constructed another and larger pipe, which is capable of diverting more water than he is entitled to divert, he cannot be injured by an injunction against the excessive diversion, regardless of whether the smaller pipe would or would not divert all the waters of the stream.—*Id.*
8. WATER RIGHTS—APPROPRIATION FOR SPECIAL USE—RIGHTS OF SUBSEQUENT APPROPRIATOR—TEMPORARY DIVERSION — INJUNCTION — INSUFFICIENT FINDINGS.—In an action by a subsequent appropriator of water for purposes of irrigation and domestic use, to restrain its diversion when not needed by a prior appropriator for mill purposes, an allegation that the defendant was continuing, and that he threatened to continue, to divert the water, when not needed for mill purposes, is material; and a finding that on a certain day the defendant deprived the plaintiff of the use of the water is insufficient to sustain an injunction, without a finding as to how long the deprivation continued, or as to whether the defendant threatened to continue it.—*Ball* v. *Kehl*, 505.
9. WATER RIGHTS—CONSTRUCTION OF CONTRACT.—A contract for the supply of water for irrigation, construed, and *held* to entitle the defendant, daily, to two and one quarter inches of water, miners' measure, under a four-inch pressure.—*San Diego Flume Co.* v. *Chase*, 561.

See EASEMENT; IRRIGATION DISTRICTS.

WAY. See EASEMENT.

WILLS.

1. REVOCATION—HUSBAND AND WIFE—"MARRIAGE CONTRACT"—SETTLEMENT UPON SEPARATION—CONSTRUCTION OF CODE.—The term "marriage contract," as used in section 1299 of the Civil Code, concerning the revocation of a will by marriage of the testator, unless provision is made for the wife by marriage contract, etc., refers to and designates only such a contract or settlement between husband and wife as expressly purports in its terms to be a marriage contract, and to make provision for the wife in lieu of a testamentary provision for her, and does not include a post-nuptial agreement which merely purports to settle property rights between them in view of a separation.—*Corker* v. *Corker*, 645.
2. CONTEST OF WILL—BURDEN OF PROOF.—When an antenuptial will is offered for probate, the surviving wife need only show the subsequent marriage, in order to defeat the probate; and the burden is then cast upon the proponent of

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the will, if he relies upon a marriage contract to prevent a revocation of the will, to prove the contract and show by its terms that it purports to make provision for the wife, and that such provision was intended to take the place of a testamentary provision for her.—*Id.*

3. EVIDENCE—MARRIAGE CONTRACT—INTENTION OF PARTIES.—Upon the contest of an antenuptial will by a surviving wife, no evidence can be adduced by the propoent of the will respecting what is claimed to be a marriage contract, other than the instrument itself, with proof of its execution if denied; and if the instrument does not purport upon its face to be a marriage contract within the meaning of the code, the court cannot receive any other evidence that such was the intention of the parties.—*Id.*

4. JURISDICTION OF PROBATE COURT.—Where an antenuptial will is shown to have ben revoked by marriage, and no marriage contract is proved, the power of the probate court is limited to denying probate to the will, and determining who has a right to administer upon the estate; and it has no jurisdiction to inquire into any facts affecting the consideration, validity, or operation of a deed of separation between the testator and his wife.—*Id.*

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87 Cal. 1-10. **ESTATE OF OSBORN.**

Executor held liable for default of coexecutor but allowed commissions, p. 5.

Cited in Estate of Carver, 123 Cal. 104, on point that right to commissions is not lost because administrator is held liable for loss to estate.

87 Cal. 11-15. **ROBINSON v. MERRILL.**

Street Assessment.—Foreclosure Suit must be brought against all of owners of specific property assessed, p. 12.

To same effect in Foley v. Bullard, 97 Cal. 517, discussing effect of nonservice of notice of appeal on some of codefendants in such action.

Answer is sufficient as denial when containing averment of ownership inconsistent with that of complaint, p. 14.

To same effect in Burris v. Ditch Co., 104 Cal. 253, holding answer to contain sufficient denial and stating general rule on subject.

87 Cal. 15-23. **LEHMANN v. SCHMIDT.**

Assumpsit Will Lie for value of property converted, tort being waived, p. 20.

Approved in Crown Cycle Co. v. Brown, 39 Or. 289, following rule; Chittenden v. Pratt, 89 Cal. 184, further holding variance not shown on such action.

Bailee Waives Lien by refusal on demand to deliver up property when not asserting lien, p. 21.

To same effect in Williams v. Ashe, 111 Cal. 184, but holding aliter as to pledgee and sustaining rights of bona fide purchaser from pledgee; Chase v. Putnam, 117 Cal. 369, holding lien of distrainer of trespassing animals lost when purchasing at void sale under distraint. Cited in Brittan v. Bank, 124 Cal. 288, 71 Am. St. Rep. 63, applying rule to pledge of stock.

87 Cal. 23-28. **NORTHERN RAILWAY CO. v. JORDAN.**

Description in Patent.—Monuments will control courses when conflicting, p. 25.

See note to Johnson v. Archibald, 22 Am. St. Rep. 34, on surveys.

87 Cal. 29-34. **BIDWELL v. BABCOCK.**

Stockholder's Liability is substantially the same under Civil Code and constitution of 1879, p. 32.

To same effect in McGowan v. McDonald, 111 Cal. 66, 52 Am. St. Rep. 154, discussing liability of stockholder of banking corporation organized under law of 1862.

Complaint on Stockholder's Liability must show proportion of his holding when debt incurred to entire then subscribed stock, p. 32.

To same effect in Roebling's Sons Co. v. Butler, 112 Cal. 679, holding complaint insufficient; Danielson v. Yoakum, 116 Cal. 384, on point that only such are liable as were stockholders when debt incurred.

87 Cal. 38-40. **URTON v. WOOLSEY.**

Venue.—Foreclosure of Vendor's Lien on realty must be commenced in county of situs, p. 39.

To same effect in Fritts v. Camp, 94 Cal. 398, as to action to quiet title to easement; Southern Pacific etc. Co. v. Pixley, 103 Cal. 120, as to action to foreclose vendor's lien; Duffy v. Duffy, 104 Cal. 604, as to action to compel conveyance, but sustaining trial in another county under removal by stipulation, when properly commenced; Konold v. Railway Co., 16 Utah, 160, on point that action must be dismissed if not commenced in prescribed county; dissenting opinion in Gibbs v. Gibbs, 26 Utah, 427, majority holding district court of county in which plaintiff in divorce suit resides had jurisdiction of action for divorce for adultery committed in another county.

87 Cal. 40-48. **SPAULDING v. NORTH SAN FRANCISCO HOMESTEAD ASSOCIATION.**

Finding of facts on which jurisdiction rests is conclusive against collateral attack, p. 42.

Cited in Chase v. Trout, 146 Cal. 369, resolution of intention to change grade is conclusive that owners of majority of frontage had petitioned for its passage; California etc. Co. v. Moran, 128 Cal. 378, but held inapplicable on appeal in street assessment case under facts stated; German etc. Soc. v. Ramish, 138 Cal. 130, holding passage of resolution of intention conclusive as to ownership of petitioners. See note 23 Am. St. Rep. 114.

87 Cal. 49-61. **BENSON** v. **SHOTWELL.** S. C. 103 Cal. 163.

Vendor and Vendee.—Contract held to be for purchase of land, and not sale of option to purchase, p. 54.

Cited in Easton v. Montgomery, 90 Cal. 312, 25 Am. St. Rep. 127, so ruling as to similar contract.

Statute of Frauds.—Vendor alone need sign contract when he is party to be charged, p. 54.

To same effect in Burke v. Bours, 98 Cal. 171, holding such contract binding under facts stated.

Vendor and Vendee.—"Satisfactory title" does not embrace one resting on adverse possession, p. 56.

Cited in Gwin v. Calegaris, 139 Cal. 387, noted under Turner v. McDonald, 76 Cal. 177.

Vendor must submit to vendee all evidence in his possession to obviate apparent defect in record, p. 57.

To same effect in Easton v. Montgomery, 90 Cal. 313, 25 Am. St. Rep. 128, discussing respective duties of parties as to clearing record.

Action to Quiet Title is in nature of suit in equity, p. 60.

Approved in Montana Ore etc. Co. v. Boston etc. Min. Co., 27 Mont 309, defendant in action under Code of Civil Procedure, section 1310, to try adverse claim to mining property is not entitled to jury.

87 Cal. 62-78. **MITCHELL** v. **SOUTHERN PACIFIC RAILROAD CO.**

Negligence.—Burden of Proof is on railroad company to show due care, in action by passenger, p. 72.

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Contributory Negligence is question of fact, p. 74.

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Negligence.—Evidence is admissible of action of copassengers with plaintiff at time of accident, p. 75.

Cited in Holman v. Railroad Co., 114 Mich. 212, admitting such evidence to show contributory negligence.

87 Cal. 78-84. **EX PARTE WILLIAMS.**

Sentence.—Legislature may provide that imprisonment in house of correction be ordered in certain cases, p. 79.

Cited in State v. Beeder, 44 La. Ann. 1014, holding certain local act constitutional.

Habeas Corpus will not lie to review sufficiency of evidence to sustain conviction, p. 81. See note to Morrill v. Morrill, 23 Am. St. Rep. 109, on habeas corpus.

87 Cal. 84-88. **CITY OF NAPA v. HOWLAND.**

Ejectment was sustained in suit by city for part of public levee and street, p. 84.

Cited in support of general rule in San Francisco v. Grote, 120 Cal. 61, 65 Am. St. Rep. 156 (but see concurring opinion, 63).

87 Cal. 88-91. **WIDMER v. MARTIN.**

Judgment on Pleadings is erroneous when even single material issue exists, p. 91.

Approved in Norris v. Lilly, 147 Cal. 758, in action to cancel deed for fraud where fraud is denied in answer and full performance of oral contract to support grantor, which was consideration, is alleged, judgment on pleadings is improper; Summerville v. Stockton etc. Co., 142 Cal. 544, upholding denial of motion for judgment on pleadings by bankruptcy trustee of lessee as cross-complainant where material issue raised; Iba v. Central Assn., 5 Wyo. 367, reversing such judgment.

87 Cal. 91-96. **EX PARTE TAYLOR.**

Obstruction of Street is public nuisance and may be prohibited by municipal ordinance, although fine differed from that in state statute, p. 94.

To same effect in Vanderhurst v. Tholcke, 113 Cal. 152, denying injunction to prevent removal by city council of shade trees on sidewalk; Kansas City v. Hallett, 59 Mo. App. 166, sustaining ordinance as to lotteries, as not in conflict with general state statute.

"Street" includes sidewalk as well as roadway, p. 94.

Cited in Martinovich v. Woolley, 128 Cal. 143, noted under Bonnet v. San Francisco, 65 Cal. 230.

Obstruction of Street.—Prescriptive right cannot be established, p. 95.

Cited in Town v. Smith, 128 Cal. 235, applying rule to right to maintain ditch when injurious to public streets.

87 Cal. 104-108. **DUFF v. DUFF.** S. C. 101 Cal. 2, 8; and see **RANDALL v. DUFF,** 101 cal. 82.

87 Cal. 109-114. **JONES v. DUCHOW.**

Witness cannot be impeached by evidence as to specific acts, p. 114.

Cited in Estate of James, 124 Cal. 657, noted under Hinkle v. Railroad Co., 55 Cal. 627; People v. Warren, 134 Cal. 205, noted under People v. Hamblin, 68 Cal. 103; People v. White, 142 Cal. 295, witness cannot be impeached by showing prior convictions of misdemeanors.

87 Cal. 115-116. **McPHAIL v. BUELL.**

Real Estate Broker cannot recover commissions when payable out of purchase price, and this is not paid, p. 116.

Cited in dissenting opinion, Oullahan v. Baldwin, 100 Cal. 657, as among forms of broker's contract; Owen v. Ramsey, 23 Ind. App. 289, denying recovery under facts stated. Distinguished in Bush v. Abraham, 25 Oreg. 348, discussing question of "payment" of note. Note citations: Kalley v. Baker, 28 Am. St. Rep. 548, on general subject.

Written Contract of employment is necessary for recovery of real estate broker's commissions, p. 115.

Cited in McGeary v. Satchwell, 129 Cal. 390, noted under McCarthy v. Loupe, 62 Cal. 300.

Appeal.—Errors are immaterial as to evidence and instructions when appellant not entitled to recover in any event, p. 116.

To same effect in Duffy v. Duffy, 104 Cal. 607, as to errors in exclusion of evidence.

87 Cal. 117-121. PEOPLE v. BEMMERLY. S. C. 98 Cal. 299, 303.

Juror may be Peremptorily Challenged after being sworn but before jury completed, p. 120.

To same effect in People v. Durrant, 116 Cal. 197, 198, as to re-examination of juror on matters coming to knowledge of parties after he was sworn.

Reasonable Doubt.—Instruction held erroneous, p. 120.

Cited in People v. Paulsell, 115 Cal. 12, also holding instruction erroneous; Lovett v. State, 30 Fla. 158, and Jenkins v. State, 35 Fla. 831, 48 Am. St. Rep. 293, ruling similarly. Note citations: Wacaser v. People, 23 Am. St. Rep. 688, and Burt v. State, 48 Id. 576, 577, on general subject.

Dying Declaration is admissible when made under sense of impending death, although not so stating in terms, p. 118.

To same effect in State v. Foot You, 24 Oreg. 65, admitting like declaration, and State v. Craine, 120 N. Car. 602, ruling similarly, although person lived five months afterward. Distinguished in People v. Fuhrig, 127 Cal. 416, rejecting declaration when belief of impending death not established; but cf. People v. Amaya, 134 Cal. 535, admitting declaration.

General Citation.—Patzwald v. United States, 7 Okla. 236.

87 Cal. 122-124. PEOPLE v. PEREZ.

Grand Larceny.—Verdict of "guilty as charged" is conviction of grand larceny when information therefor, p. 123.

To same effect, sustaining such verdict, although not specifying value of property taken, in Stall v. Kelliher, 32 Oreg. 244.

87 Cal. 126-134. **FLICKINGER v. SHAW**; 22 Am. St. Rep. 234.

Execution of prescribed acts by licensee held to create estoppel under facts stated, p. 131.

Cited in Blankinship v. Whaley, 124 Cal. 304, decreeing specific performance of parol contract for easement where executed; Los Angeles v. Water Co., 124 Cal. 379 (quoted in S. C. 177 U. S. 584), quoting Water Co. v. Los Angeles, 88 Fed. 745; Wallace v. Dodd, 136 Cal. 211, holding mortgagee estopped from claiming, under foreclosure sale, property as to which he asserted he had no claim; Foster v. Bear Valley etc. Co., 65 Fed. Rep. 845, holding corporate stockholders estopped under facts; Los Angeles etc. Co. v. City, 88 Fed. Rep. 745, sustaining parol license where large expenditures made; Sloan v. Glancy, 19 Mont. 76, holding right to use water for irrigation established under facts. Note citations: Grimshaw v. Belcher, 22 Am. St. Rep. 301, and Buck v. Foster, 62 Id. 430, on licenses. Distinguished in Griseza v. Terwilliger, 144 Cal. 462, evidence of verbal sale of unappropriated water right by defendant's grantor is admissible as declaration against interest.

87 Cal. 134-140. **McMENOMY v. BAUD.**

Nuisance.—Injunction will not lie against general conduct of business when injury is caused alone by particular manner in which then operated, p. 139.

To same effect in Lorenz v. Waldron, 96 Cal. 249, 250, denying injunction against construction of tunnel when no reasonable probability appears of irreparable injury to plaintiff's property; Fresno v. Fresno etc. Co., 98 Cal. 184, holding erroneous a decree abating utterly canal running through city; Byers v. Irrigation Co., 134 Cal. 555, enjoining merely a particular use of a dam, when creating a nuisance.

87 Cal. 140-150. **CRALL v. POSO ETC. DISTRICT.**

Irrigation District organized under Wright act is public corporation, p. 145.

To same effect in People v. Turnbull, 93 Cal. 632, but holding indictment (section 165, Penal Code) not to show corporation to have been so organized; People v. Selma etc. District, 98 Cal. 208, further holding as to dissolution of such corporation.

Irrigation Districts.—Wright act is constitutional, p. 145.

To same effect in In re Central etc. Dist., 117 Cal. 389, citing main case also at p. 386, as to construction of amendatory act; Board v. Collins, 46 Neb. 418, discussing similar local act. Denied in Bradley v. Fallbrook etc. Dist., 68 Fed. Rep. 956, declining to follow state decisions.

Constructive Notice, when allowed by statute, gives notice to the world, p. 147.

Cited in Estate of Davis, 136 Cal. 595, as to notice of probate of will; Estate of Leonis, 138 Cal. 200, as to notice of sale of real estate.

Irrigation District.—Decree under Wright act is conclusive as being in rem, except as to appeal, p. 150.

To same effect in Rialto etc. Dist. v. Brandon, 103 Cal. 387, holding such decree admissible to establish facts therein contained; Cullen v. Water Co., 113 Cal. 516, where objection made that validity of bonds was determined in advance of litigation as to validity; Wood v. Jordan, 125 Cal. 262, noted under Mayo v. Ah Loy, 32 Cal. 477; People v. Irrigation Dist., 128 Cal. 481, 482, citing main case also on constitutionality of Wright act; Perris Irr. Dist. v. Thompson, 116 Fed. 835, where answer in action on California irrigation district bonds was not verified, and bonds bearing district seal were pleaded in haec verba and introduced in evidence, plaintiff not required to prove their issuance or their confirmation by the court; Miller v. Perris etc. District, 85 Fed. Rep. 701, holding state decisions binding on federal courts. Distinguished in Page v. W. W. Chase Co., 145 Cal. 583, in foreclosure of street assessment land is not party and proceeding is not in rem.

87 Cal. 151-157. **WHITE v. PATTON.**

Cross-complaint must be served on all parties affected thereby, p. 153.

Cited in Houghton v. Tibbetts, 126 Cal. 61, and Hibernia etc. Soc. v. London etc. Co., 138 Cal. 260, noted under Hibernia etc. Soc. v. Fella, 54 Cal. 597; Culmer v. Caine, 22 Utah, 228, on point that court has no jurisdiction of subject matter without such service.

Mortgage Foreclosure.—Defendant who claims must assert right by cross-complaint, p. 153.

Cited in Stockton etc. Soc. v. Harrold, 127 Cal. 619, when new parties and other properties are to be reached.

Jurisdiction is obtained by service of summons, p. 152.

Cited in Hansen v. Wagner, 133 Cal. 71, holding judgment rendered thereafter not attackable collaterally.

87 Cal. 158-162. **FIRST NATIONAL BANK v. HOLT.**

Mortgage Foreclosure—Attorneys' Fees.—Complaint need not allege what reasonable fee would be, p. 161.

Cited in Prescott v. Grady, 91 Cal. 522, and Woodward v. Brown, 119 Cal. 309, 63 Am. St. Rep. 129, cited under Monroe v. Fohl, 72 Cal. 571.

87 Cal. 162-166. **EX PARTE HODGES.**

Ordinance requiring land owners to exterminate squirrels within ninety days, is void, p. 165.

Distinguished in Denninger v. Recorder's Court, 145 Cal. 637, upholding ordinance of city of fifth class fixing maximum gas rate and declaring it a misdemeanor to collect more.

87 Cal. 166-177. **EBY v. BOARD OF SCHOOL TRUSTEES.**

Mandamus.—Taxpayer may obtain against school trustees to compel location of schoolhouse as determined by election, p. 173.

To same effect in Frederick v. San Luis Obispo, 118 Cal. 393, awarding writ to taxpayer to compel city trustees to call election to disincorporate city; Santa Rosa etc. Co. v. Woodward, 119 Cal. 34, as to writ to compel common council to advertise for proposals to light city, although no actual pecuniary damage to petitioner through their neglect shown; cited in State v. Board, 21 Mont. 474, applying principle to application for certiorari; State v. Sneed, 105 Tenn. 729, granting writ to compel cancellation of entry of judgment prejudicing petitioner's right of appeal.

87 Cal. 178-192. **STAPLES v. MAY.**

Mortgage Foreclosure.—Receiver cannot be given possession of property not included in mortgage, p. 188.

To same effect in Kreling v. Kreling, 118 Cal. 423, holding void an order after judgment appointing receiver for property not included in judgment; Sullivan v. Gage, 145 Cal. 768, refusing mandamus to compel state board of examiners to allow claim for fees of attorney for receiver appointed under void order in suit by state to dissolve corporation.

Receiver who extracts ores without authority is liable for their net value, p. 189.

Cited in Locke v. Klunker, 123 Cal. 240, allowing expenses on sale of grain wrongfully harvested.

87 Cal. 192-200. **KELLOGG v. COCHRAN.**

Insane at Asylums may be discharged by resident physicians when reason permanently recovered, and courts have no jurisdiction under section 1766 of the Code of Civil Procedure, pp. 197, 198.

To same effect on first point, in People v. Geiger, 116 Cal. 441, sustaining discharge made after inmate's escape from asylum; and, on second point, in Aldrich v. Superior Court, 120 Cal. 142, denying mandamus to compel superior court to restore such inmate to capacity, when not shown to have any legal guardian.

Appeal.—Petition for Rehearing cannot cover points not raised in original argument, p. 200.

To same effect in San Francisco v. Pacific Bank, 89 Cal. 25, although appellant's attorneys were changed meanwhile; Wilcox v. Luco, 118

Cal. 643, 62 Am. St. Rep. 307, discussing effect of failure of court in prior case to consider point raised in such petition; Beck v. Thompson, 22 Nev. 421 (cited in Merchant's Bank v. Greenhood, 16 Mont. 461, 462), denying rehearing.

Malicious Prosecution for Insane Commitment.—Order of commitment does not show probable cause, p. 199.

See notes to Ross v. Hixon, 26 Am. St. Rep. 137, on prosecutions; State v. Billings, 43 Id. 540, on remedies of insane; Flach v. Gottschalk Co., 71 Am. St. Rep. 427.

87 Cal. 200-203. **IN RE BABY;** 22 Am. St. Rep. 239.

Dismissal of Appeal will be granted from satisfied decree of distribution, p. 202.

To same effect in Kenney v. Parks, 120 Cal. 24, but ruling aliter where satisfaction of judgment satisfied against will of appellant; Estate of Shaver, 131 Cal. 221, dismissing appeal by distributee who has received his distributive share; Warner v. Freud, 131 Cal. 646, 82 Am. St. Rep. 405, but holding right of appeal not lost by payment of the judgment unless intended as a compromise or waiver of the right; Storke v. Storke, 132 Cal. 353, noted under People v. Burns, 78 Cal. 646. Note citations: State v. Conkling, 45 Am. St. Rep. 271, on general subject.

87 Cal. 203-209. **MARTIN v. MORGAN;** 22 Am. St. Rep. 240.

Vendee Will Forfeit installments paid, on default, where contract clearly shows such intent, p. 207.

Cited in Glock v. Howard etc. Co., 123 Cal. 9, 69 Am. St. Rep. 24, and Williams v. Long, 139 Cal. 189, noted under Grey v. Tubbs, 43 Cal. 359; Whitman v. Perkins, 56 Neb. 187, on point that vendor may insist on forfeiture when time is made of the essence; Coughran v. Bigelow, 9 Utah, 263, further holding contract stipulations to control those of accompanying bond.

87 Cal. 209-210. **FORD v. CUNNINGHAM.**

Secondary Evidence.—Oral evidence of contents is inadmissible unless nonexistence of copies is shown, p. 210.

Cited in Phillips v. United States etc. Soc., 125 Mich. 190, applying rule to oral evidence of contents of insurance policies.

87 Cal. 211-214. **GRAY v. SABIN.**

Judgment Will not be Vacated for neglect or mistake of attorney, p. 214.

To same effect in dissenting opinion in Horton v. New Pass Co., 21 Nev. 193, to main opinion reversing order refusing to vacate default.

87 Cal. 214-221. GILLIS v. CLEVELAND.

Street Assessment is not vitiated by immaterial error in record of warrant of assessment, p. 219.

To same effect in Anderson v. De Urioste, 96 Cal. 407, as to error in contractor's name in resolution of extension when contract otherwise identified; cited in Moffitt v. Jordan, 127 Cal. 625, noted under San Francisco v. Real Estate, 50 Cal. 188; Blanchard v. Ladd, 135 Cal. 215, 217, applying rule to omission in copy of diagram of false call in the original.

87 Cal. 221-225. SCOTT v. GLENN.

Vendee cannot recover part of purchase money paid, when forfeited under terms of contract by his own default, but no rescission had, p. 224.

To same effect in Phelps v. Brown, 95 Cal. 575, 576, but ruling aliter where contract abandoned or rescinded by both parties; May v. Johnson, 5 S. Dak. 243, denying recovery under facts stated. Note citations: Munro v. Long, 28 Am. St. Rep. 854, on vendee's rescission.

87 Cal. 226-236. BISHOP v. SUPERIOR COURT.

Eminent Domain.—Prohibition will not lie on allegation of error in exercise of jurisdiction, p. 233.

To same effect in Pacific etc. Co. v. Wade, 91 Cal. 457; 25 Am. St. Rep. 208, denying writ under facts stated; dissenting opinion in State v. Wood, 155 Mo. 471, discussing right to enjoin enforcement of void statute.

87 Cal. 236-241. VORWERK v. NOLTE.

Provision that time shall be of essence is made to protect vendor against delays in payment, p. 240.

To same effect in Newton v. Hull, 90 Cal. 494, and Raymond v. San Gabriel etc. Co., 53 Fed. Rep. 886, cited under Wilcoxson v. Stitt, 65 Cal. 596; Glock v. Howard etc. Co., 123 Cal. 9, 69 Am. St. Rep. 24, noted under Grey v. Tubbs, 43 Cal. 359. Note citations: Martin v. Morgan, 22 Am. St. Rep. 243, on general subject.

87 Cal. 241-245. PERKINS v. COOPER.

Undertaking on Appeal.—Failure to file is not waived by stipulation in transcript that it had been filed, when made through mistake and after attempted appeal taken, p. 244.

Distinguished in Forni v. Yoell, 95 Cal. 443, holding respondent estopped by similar stipulation made before appeal time had expired, and apparently relied upon by appellant; and see S. C. 99 Cal. 174; Duncan v. Times etc. Co., 109 Cal. 607, on point that clerk's certificate as to filing of undertaking is not conclusive on supreme court.

87 Cal. 245-249. **WHITE v. ALLATT.**

Mortgage Foreclosure—Attorney's Fees.—Complaint need not allege amount as being reasonable, p. 248.

Cited in Prescott v. Grady, 91 Cal. 522, and Woodward v. Brown, 119 Cal. 309; 63 Am. St. Rep. 129, cited under Monroe v. Fohl, 72 Cal. 568; Thrasher v. Moran, 146 Cal. 685, upholding decree providing for smaller attorney's fees than stipulated; Orange Growers' Bank v. Duncan, 133 Cal. 257, allowing fees without allegation in complaint.

Conjunctive Demurrer for uncertainty and ambiguity will be overruled when complaint not subject to such objections, p. 248.

To same effect in Greenebaum v. Taylor, 102 Cal. 626, holding demurrer properly overruled.

87 Cal. 253-256. **DRINKHOUSE v. SPRING VALLEY WATER WORKS.**

Judgment in Condemnation operates as estoppel on lessee pendente lite, when lis pendens recorded, p. 255. See note to Hope v. Blair, 24 Am. St. Rep. 373, on lis pendens.

87 Cal. 256-266. **WINTER v. McMILLAN**; 22 Am. St. Rep. 243.

Appeals from Judgment and new trial order may be taken in one notice, p. 261.

To same effect in Hawkins v. Hubbard, 2 S. Dak. 634, construing local statute, and denying dismissal.

Action to Quiet Title.—Plaintiff has burden to prove title, p. 261.

To same effect in Heney v. Pesoli, 109 Cal. 58, but holding proof of possession not necessary under code; Goldberg v. Bruschi, 146 Cal. 711, in action to quiet title to mining claim, where defendant proves prior location, plaintiff may in rebuttal prove that defendant has failed to do annual work.

Agent to Sell cannot convey to self and wife for nominal consideration, p. 262.

See notes to Green v. Hugo, 26 Am. St. Rep. 828; Darlington's Estate, 30 Id. 785.

Action to Quiet Title.—Cross-complaint may be filed in where necessary, p. 264.

Cited in Islais etc. Co. v. Allen, 132 Cal. 435, holding it improperly stricken out.

Cross-Complaint.—**New Parties** may be brought in where necessitated thereby, p. 265.

To same effect in Alpers v. Bliss, 145 Cal. 571, following rule; Eureka

v. Gates, 120 Cal. 58, further holding prayer of cross-complaint to include their being made parties; Mackenzie v. Hodgkin, 126 Cal. 595, 77 Am. St. Rep. 212, noted under Colton etc. Co. v. Raynor, 57 Cal. 592; Lewis v. Fox, 122 Cal. 250, but holding such parties unnecessary; Chalmers v. Trent, 11 Utah, 98, 99, sustaining practice in partition suit. Note citations: White v. Johnson, 50 Am. St. Rep. 738, on new parties.

General Citation.—Scottish etc. Ins. Co. v. Dangaix, 103 Ala. 392.

87 Cal. 267-274. HAVEMEYER v. SUPERIOR COURT.

Receiver cannot be appointed on forfeiture of corporate charter, p. 270.

Approved in Sullivan v. Gage, 145 Cal. 762, 768, refusing mandamus to compel state board of examiners to allow claim of fees for attorney for receiver appointed to suit to dissolve corporation.

87 Cal. 275-280. WOODRUFF v. SEMI-TROPIC ETC. CO.

Vendor and Vendee.—Time held to be of essence of contract, p. 280.

Cited in Glock v. Howard etc. Co., 123 Cal. 9, 69 Am. St. Rep. 24, noted under Grey v. Tubbs, 43 Cal. 359. See note 22 Am. St. Rep. 243.

87 Cal. 281-287. PEOPLE v. DOUGLASS.

Railroads.—Person on passenger car is prima facie presumed to be passenger, p. 284.

Cited in Fitzgibbon v. Railway Co., 108 Iowa, 619, holding evidence sufficient to warrant submission to jury. See note 61 Am. St. Rep. 78.

Criminal Law.—Verdict in general terms is sufficient, p. 283.

Cited in People v. Tilley, 135 Cal. 62, but holding verdict insufficient when omitting essentials of knowledge and intent.

87 Cal. 290-291. CAMPE v. MEIERDIERCKS.

Where Evidence is Conflicting, judgment will not be disturbed, p. 291.

Approved in Coffin v. Bradbury, 3 Idaho, 792, applying rule in action for value of goods sold.

87 Cal. 292-295. IN RE McMANUS; 22 Am. St. Rep. 250; note, 253.

Exemption Statutes are remedial and to be liberally construed, p. 294.

To same extent in Holmes v. Marshall, 145 Cal. 779, proceeds of life insurance payable to administrator and set apart to widow, are exempt from her debts; Elliot v. Hall, 2 Idaho, 1144; 35 Am. St. Rep. 287 (and

note, p. 289), exempting wages under local statute; Betz v. Maier, 12 Tex. Civ. App. 222, construing "tools and implements" to include safe used by insurance broker; cited also in Estate of Klemp, 119 Cal. 43, 63 Am. St. Rep. 71, as discussing 71 Cal. 74; In re Petersen, 95 Fed. 418, exempting baker's implements of labor; In re Hindman, 104 Fed. 333, noted under Brusie v. Griffith, 34 Cal. 302; Elliott v. Hall, 3 Idaho, 424, exemption of earnings from attachment or execution continues while earnings are under control of debtor, though temporarily in hands of another. Note citations: Files v. Stevens, 30 Am. St. Rep. 334, and Davidson v. Hannon, 52 Id. 285, on general subject.

87 Cal. 296-306. CONKLING v. PACIFIC IMPROVEMENT CO.

Diversion of Water.—Injunction will be granted without proof of damages, p. 305.

To same effect in Spargur v. Heard, 90 Cal. 230, and Mott v. Ewing, 90 Cal. 237, cited under Moore v. Water Works, 68 Cal. 146; Waddingham v. Robledo, 6 N. Mex. 373, discussing right to injunction therein generally. Approved in California etc. Co. v. Enterprise etc. Co., 127 Fed. 743, and Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 73, both following rule; Mendelson v. McCabe, 144 Cal. 233, granting injunction to restrain use of right of way except on condition of closing gates after each passage as contained in grant; Vestal v. Young, 147 Cal. 719, enjoining construction of new ditch by patentee of land when owner of ditch had prior to patent acquired easement for ditch which he had constructed elsewhere on land.

Excessive Diversion of Water may be enjoined regardless of whether smaller pipe would or would not divert all waters of stream, p. 305.

Approved in California etc. Co. v. Enterprise etc. Co., 127 Fed. 744, where canal unlawfully diverts part of flow of stream, lower appropriator may enjoin its maintenance and entire diversion, though it also carries flood waters which may lawfully be appropriated.

87 Cal. 306-313. BOWMAN v. MOORE.

Mutual Benefit Association.—Beneficiary may be changed without his consent, p. 311.

To same effect in Griffith v. Insurance Co., 101 Cal. 636; 40 Am. St. Rep. 99, but ruling aliter as to ordinary life insurance policy; Hoeft v. Supreme Lodge, 113 Cal. 96, further denying right of original to attack change to new beneficiaries for fraud in procurement of change; Delaney v. Delaney, 175 Ill. 200, sustaining such right without express permission in regulations of society. Note citations: Rollins v. McHatton, 25 Am. St. Rep. 264, and Lake v. Minnesota etc. Assn., 52 Id. 561, 562, 563, on general subject.

87 Cal. 313-323. **FISKE v. SOULE.**

Real Estate Broker is not deprived of right to commissions, by owner's refusal to consummate sale, p. 321.

To same effect in Fenn v. Ware, 100 Ga. 566, sustaining recovery under facts stated. Note citations: Kalley v. Baker, 28 Am. St. Rep. 546, 547, on general subject.

87 Cal. 323-328. **ABBOTT v. THE '76 LAND ETC. CO.**; S. C. 101 Cal. 567, 568, 571; 103 Cal. 607, 609.

Corporation is Bound by statements of secretary when in charge of entire corporate business, p. 328.

To same effect in Andres v. Fry, 113 Cal. 128, sustaining contract made by executive committee of board of directors.

Miscellaneous.—miscited in Sussman v. San Luis Obispo Co., 126 Cal. 540.

87 Cal. 329-344. **BAKER v. BRICKELL**; S. C. 102 Cal. 620.

Pueblo Lands were held in trust for inhabitants, p. 334.

Cited in Holladay v. San Francisco, 124 Cal. 356, noted under Hart v. Burnett, 15 Cal. 530.

Van Ness Ordinance.—Procedure for deed thereunder discussed, p. 336.

Cited in San Francisco etc. Co. v. Hartung, 138 Cal. 228, discussing difference between grants under Van Ness Ordinance and those under Outside Land Acts; Amy v. Amy, 12 Utah, 333, on point that mayor's deed under town site act was conclusive collaterally as to necessary occupancy.

Administratrix of Husband's Estate not estopped by inventory from claiming property as separate, p. 342.

Approved in In re Belt's Estate, 29 Wash. 540, administrator not estopped from denying that proceeds of judgment recovered in representative capacity were assets of estate, where such judgment was for recovery of trust funds in action by intestate in own name, but in fact as trustee, and in which administrator had been substituted.

87 Cal. 348-366. **PEOPLE v. POWELL.**

Change of Venue.—Statute authorizing, in criminal case, on motion of prosecution and without defendant's consent, is invalid, p. 355.

To same effect in Kohl v. Lehlback, 160 U. S. 302, but holding objection to particular juror waivable by defendant; dissenting opinion in People v. Prather, 134 Cal. 390, 391, discussing information under section 786, Penal Code.

Criminal Law.—Change of Venue will be granted defendant if no fair and impartial jury can be secured, p. 361.

To same effect in concurring opinion in People v. Wong Ark, 96 Cal. 137 (and see 138), on point that trial by such jury is right of defendant; People v. Suesser, 132 Cal. 632, holding change improperly denied under facts stated.

Murder.—Evidence is admissible that deceased was not then armed, to rebut evidence of defendant's belief that deceased was armed, but not to sustain his good character when not attacked, p. 362.

To same effect on first point in People v. Sehorn, 116 Cal. 509, admitting similar evidence; People v. Adams, 137 Cal. 581, admitting such evidence, and evidence of declarations of deceased made in defendant's presence, that former carried no arms. Note citations: Childers v. State, 28 Am. St. Rep. 911, on evidence of character.

Hearsay.—Evidence of conversations of witness with third persons is inadmissible unless connected with defendant, p. 363.

Cited in People v. Landis, 139 Cal. 431, noted under People v. Carlton, 57 Cal. 83.

Self-defense.—Evidence is admissible that shows that defendant acted as a reasonably prudent man, p. 364.

Cited in State v. Burton, 63 Kan. 610, admitting evidence of threats by deceased.

Criminal Law.—Private Counsel may be allowed to assist district attorney, p. 365.

To same effect in Thalheim v. State, 38 Fla. 189, stating limitations of rule; State v. Kent, 4 N. Dak. 588, when such counsel was nonresident and not of state bar.

87 Cal. 390-393. **VANCE v. SUPERIOR COURT.**

Bill of Exceptions.—Mandamus will not lie to compel judge to resettle bill when no exceptions were disallowed, p. 391.

To same effect in Hyde v. Boyle, 89 Cal. 592, and Jennings v. Brown, 109 Cal. 293; cited under Hyde v. Boyle, 86 Cal. 352; Estate of Dolbeer, 147 Cal. 360.

87 Cal. 394-398. **KIRKWOOD v. SOTO.**

Offices—Increase of Compensation.—Act is valid, passed during incumbency, permitting allowance of incidental expenses incurred by officer, p. 395.

Distinguished in concurring opinion in Dougherty v. Austin, 94 Cal. 622, as to ordinance permitting county clerk to employ deputy at salary to be paid by county; Chapin v. Wilcox, 114 Cal. 501, holding compensation of certain supervisors as fixed in county government act to be inclusive of all expenses. Distinguished in Agard v. Shaffer, 141 Cal.

727, holding void Political Code, section 3678, directing supervisors to provide for additional help for county recorder.

Offices.—"Compensation" and salary are used synonymously in constitution and county government act, p. 396.

To same effect in Martin v. Santa Barbara, 105 Cal. 212, discussing fees of constables in counties of twenty-first class.

87 Cal. 399-409. SUKEFORTH v. LORD.

Fraudulent Conveyance.—Justification of sheriff in action for wrongful attachment cannot allege fraud generally, p. 402.

To same effect in Mason v. Vestal, 88 Cal. 397; 22 Am. St. Rep. 311, but ruling aliter as to mere justification; and see Banning v. Marleau, 121 Cal. 244, as to distinction between these cases.

Insufficiency of Answer is waived by failure to object thereto or to evidence submitted in its support, p. 403.

To same effect in Illinois etc. Bank v. Railway Co., 115 Cal. 297, as to cross-complaint; Treanor v. Williams, 145 Cal. 320, applying principle in election contest; Mangum v. Bullion etc. Co., 15 Utah, 543, as to complaint. Approved in Larsen v. Utah L. etc. Co., 23 Utah, 459, where allegations of fraud in complaint are general, objection thereto cannot be first raised on appeal.

Instructions.—Exceptions to oral charge must be taken specifically, and before jury retires, p. 407.

To same effect in Cavallaro v. Railway Co., 110 Cal. 358; 52 Am. St. Rep. 101, but holding general exception sufficient as to special instruction asked by parties.

Fraudulent Conveyance—Intent.—Transfer to creditor of property in excess of debt tends to show fraudulent intent, p. 408.

To same effect in Central etc. Bank v. Doran, 109 Mo. 50, as to withholding of deed from record.

87 Cal. 410-413. MILLER v. WADE.

Bill of Exceptions.—Nonsuit must be specified therein as error in law, p. 411.

Overruled in Barfield v. Irrigation Co., 111 Cal. 119, holding no such specification necessary.

Specifications of Error in bill of exceptions must distinctly point out the error complained of, p. 411.

To same effect in Thompson v. Insurance Co., 21 Oreg. 491, holding certain specifications insufficient; Pierce v. Manning, 2 S. Dak. 520, but distinguishing case under local statutes; Warren v. Stoddart, 6 Idaho, 700, under Revised Statutes, section 4441, subdivision 3, statement on

motion for new trial must specify particular errors relied on. Distinguished in Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 595, upholding action to restrain independent diverters of water though not acting in concert or by unity of dsign.

Nonsuit.—Appeal from order of must be taken within sixty days after judgment rendered, p. 412.

Overruled in Warner v. Darrow, 91 Cal. 311, holding error in such order reviewable on appeal as error in law.

87 Cal. 413-421. CLAVEY v. LORD.

Reopening of Case for further testimony is reversible error only for abuse of discretion, p. 419.

To same effect in Kreiss v. Hotaling, 99 Cal. 385, holding dismissal of action no such abuse, under facts; Haynes v. Schwartz Co., 5 Wash. 934, applying rule to granting of default after answer filed, but too late.

87 Cal. 428-429. CAMPBELL v. THOMAS.

Broker is entitled to commissions although sale embraces better title than was included in his contract, p. 429.

See note to Kalley v. Baker, 28 Am. St. Rep. 547.

87 Cal. 430-434. MILLER v. HIGHLAND DITCH CO.; 22 Am. St. Rep. 254.

Joinder of Defendants is erroneous in action for damages if they are tort feasors acting independently, although their several torts have united to cause injury, p. 431.

To same effect in Foreman v. Boyle, 88 Cal. 293, applying rule to joinder as plaintiff's of several riparian owners in action to enjoin diversion by third person (but see Union etc. Co. v. Dangberg, 81 Fed. Rep. 89, sustaining joinders in action for diversion); Hulsman v. Todd, 96 Cal. 232, but holding rule inapplicable when diversion was made by one defendant for benefit of all codefendants; and see Sels v. Greene, 88 Fed. Rep. 128, sustaining amendment omitting one of original defendants; South Bend etc. Co. v. Liphart, 12 Ind. App. 189, but holding one defendant liable for washout from failure to keep flume in repair, irrespective of concurrent act of another; Valparaiso v. Moffitt, 12 Ind. App. 253; 54 Am. St. Rep. 524 (and note, 528), but holding persons contributing to nuisance jointly and severally liable under facts; McBride v. Scott, 125 Mich. 529, noted under Keyes v. Water Co., 53 Cal. 724; Pacific etc. Co. v. Hanley, 98 Fed. 329, noted under Hillman v. Newington, 57 Cal. 56. Note citations: Gallagher v. Kemmerer, 27 Am. St. Rep. 677, on joint liability.

87 Cal. 441-443. LYNCH v. WELBY.

Judgment will not be Reversed when evidence is conflicting, p. 443.

Approved in Coffin v. Bradbury, 3 Idaho, 792, applying rule in action to recover price of goods sold.

87 Cal. 443-452. DREW v. PEDLAR; 22 Am. St. Rep. 257.

Vendee may recover instalment of purchase money paid, less actual damage to vendor, when contract has been rescinded, p. 449.

To same effect in White v. Buell, 90 Cal. 179; Townsend v. Tufts, 95 Cal. 259, 260, 29 Am. St. Rep. 109; Phelps v. Brown, 95 Cal. 575, 576, 577; Bradford v. Parkhurst, 96 Cal. 105; 31 Am. St. Rep. 191; Joyce v. Shafer, 97 Cal. 337; Shively v. Semi-Tropic etc. Co., 99 Cal. 261; Fountain v. Semi-Tropic etc. Co., 99 Cal. 683; Merrill v. Merrill, 103 Cal. 293 (and see S. C. 95 Cal. 338), and Way v. Johnson, 5 S. Dak. 243, cited under Cleary v. Folger, 84 Cal. 316; Easton v. Cressey, 100 Cal. 78, holding no damage to vendor shown. Note citations: Allen v. Mohn, 24 Am. St. Rep. 128, on measure of damages; Kelso v. Reid, 27 Id. 717, on liquidated damages; Berry v. Insurance Co., 28 Id. 555, on vendee's rights; Donahue v. Parkman, 42 Id. 418, on forfeiture of installment. Distinguished in Glock v. Howard etc. Co., 123 Cal. 4, 19, 69 Am. St. Rep. 20, et passim, holding vendee so entitled only in case of mutual abandonment of the contract.

Liquidated Damages.—Provision for is void unless within exceptions stated in Civil Code, sections 1670, 1671, p. 450.

Cited in Jack v. Sinsheimer, 125 Cal. 567, noted under Patent Brick Co. v. Moore, 75 Cal. 205.

87 Cal. 453-460. WILHOIT v. CUNNINGHAM.

Assignment for Benefit of Creditors divests assignor of entire estate and interest in assigned property, subject to right to reconveyance after creditors are satisfied, p. 456.

To same effect in Wilhoit v. Lyons, 98 Cal. 412, holding such transfer unaffected by improper recordation of assignment.

General Demurrer will not raise question of plaintiff's capacity to sue, p. 459.

To same effect in Tibbets v. Cohn, 116 Cal. 367, as to action by receiver; Locke v. Klunker, 123 Cal. 239, noted under Swamp Ld. Dist. v. Feck, 60 Cal. 403; Los Angeles Ry. Co. v. Davis, 146 Cal. 182, in action by corporation to quiet title to land failure to aver that plaintiff is a corporation is not available on demurrer.

87 Cal. 461-464. PETTINGER v. FAST.

Sale of realty may be made although owner receives no money, p. 463.

To same effect in Shainwald v. Cady, 92 Cal. 85, holding such sale shown by facts.

87 Cal. 464-471. McFADDEN v. SANTA ANA ETC. CO.

Contributory Negligence of husband is imputed to wife and will defeat recovery for her injuries, p. 467.

To same effect in Atlantic etc. Co. v. Gravitt, 93 Ga. 388; 44 Am. St. Rep. 160, but holding father's negligence not imputable to mother, under facts in her suit for death of minor child.

Parties.—Wife cannot sue alone for personal injuries during marriage, p. 467.

To same effect in Neale v. Railway Co., 94 Cal. 429, sustaining joint judgment in such action; Lamb v. Harbaugh, 105 Cal. 692, further holding nonjoinder of husband not allowed when wife's separation was caused by her desertion; Redfield v. Oakland etc. Co., 110 Cal. 290, but holding rule inapplicable to suit brought for injuries resulting in wife's death; McKune v. Santa Clara etc. Co., 110 Cal. 487, on point that wife is necessary plaintiff therein; but see as to this point Hawkins v. Railroad Co., 3 Wash. 596; 28 Am. St. Rep. 75 (and note 89), holding her a proper but not necessary plaintiff; Williams v. Casebeer, 126 Cal. 82, as to action for her malicious prosecution; Henley v. Wilson, 137 Cal. 277, noted under Sheldon v. Uncle Sam, 18 Cal. 527; Paine v. San Bernardino etc. Co., 143 Cal. 658, in action for injury to wife, judgment on findings of injury should be in favor of husband and wife.

Cross-examination should be liberally allowed, p. 470.

Cited in Estate of Kasson, 127 Cal. 500, noted under People v. Benson, 52 Cal. 380.

87 Cal. 471-475. BRUMLEY v. FLINT.

General Objection to Evidence is insufficient unless absolutely inadmissible for any purpose, p. 474.

To same effect in Crocker v. Carpenter, 98 Cal. 422, holding such objection insufficient; Lee v. Murphy, 119 Cal. 367, further holding such objection waived if so made; Estate of Gregory, 133 Cal. 138, noted under Thompson v. Thornton, 50 Cal. 142; Snowden v. Coal Co., 16 Utah, 373, but sustaining general objection under circumstances.

Witness.—Objection to Competency is not included in objection as to manner of proof, p. 473.

To same effect in Ah Tong v. Earle etc. Co., 112 Cal. 681, further holding that such objection cannot first be made on appeal.

87 Cal. 475-479 PEOPLE v. TYRRELL.

Appointment to Office will extend only to term authorized by statute, p. 478.

To same effect in Hale v. Bischoff, 53 Kan. 306, holding appointment valid for two years under local statutes, although made only for one.

Vacancy in Office is not created by mere expiration of term of incumbent, p. 479.

To same effect in People v. Edwards, 93 Cal. 157, denying power of governor to appoint fire commissioner, under facts, and, ruling similarly, State v. Boucher, 3 N. Dak. 399, and State v. Henderson, 4 Wyo. 551, construing local statutes; dissenting opinion in State v. Moores, 58 Neb. 295, defining vacancy under local statutes. Note citations: Taylor v. Sullivan, 22 Am. St. Rep. 733, and Kimberlin v. State, 30 Id. 213, on holding over.

87 Cal. 480-483. **IN RE COUTS**; S. C. 100 Cal. 400.

Probate Accounts.—Payment of claims is not necessary prerequisite to their inclusion in account, p. 482.

To same effect in Pennie v. Roach, 94 Cal. 522, as to claim for attorney's fees; Estate of Dudley, 123 Cal. 257, as to claim for attorney's fees.

Settlement of Account is conclusive when not appealed from and no heir laboring under disability, p. 482.

To same effect in Estate of Fernandez, 119 Cal. 582, as to payment of claim without order; Briggs v. Breen, 123 Cal. 661, but held not to compel persons not so interested to litigate claims on hearing of account; Estate of Grant, 131 Cal. 429, noted under Estate of Stott, 52 Cal. 403.

Probate Sale.—Petition for held sufficient, p. 482.

Cited in Estate of Roach, 139 Cal. 21, ruling similarly as to petition discussed.

87 Cal. 483-488. **MOORE v. LONG BEACH DEVELOPMENT CO**; 22 Am. St. Rep. 365; note, 268.

Innkeeper is not liable to boarder for loss of latter's clothes during accidental fire, p. 486.

See note to Singer etc. Co. v. Miller, 38 Am. St. Rep. 569; Fay v. Pacific etc. Co., 27 Id. 203.

87 Cal. 489-498. **SMITH v. MOHN.**

Findings should be of ultimate, not probative, facts, p. 497.

To same effect in Southern Pacific etc. Co. v. Whitaker, 109 Cal. 274, holding findings sufficient; and McCarthy v. Brown, 113 Cal. 17, ruling similarly, each in action of ejectment; In re Tsu Tse Mee, 81 Fed. Rep. 564, applying rule to findings of commissioner on deportation of Chinese.

Vendor and Vendee.—Stipulation making time of essence is for vendor's benefit, and vendee's default in payment does not abridge vendee's right to sue for purchase price, p. 498.

To same effect in Newton v. Hull, 90 Cal. 492; Banbury v. Arnold, 91 Cal. 609; Townsend v. Tufts, 95 Cal. 260; 29 Am. St. Rep. 109, and Scott v. Glenn, 98 Cal. 171; Raymond v. San Gabriel etc. Co., 53 Fed. Rep. 886; German Savings Inst. v. Machine Co., 70 Fed. Rep. 153, cited under Wilcoxson v. Stitt, 65 Cal. 596; North Stockton etc. Co. v. Fischer, 138 Cal. 103, and Shenners v. Pritchard, 104 Wis. 291, noted under Wilcoxson v. Stitt, 65 Cal. 596; Chambers v. Anderson, 51 Kan. 392, on point that vendor may waive or enforce stipulations inserted for his benefit. Note citations: Martin v. Morgan, 22 Am. St. Rep. 243, on general subject.

87 Cal. 499-505. **CITY OF SAN LUIS OBISPO v. PETTIT.**

Taxation.—"Assessment" includes levy, p. 503.

To same effect in dissenting opinion in Allen v. McKay, 120 Cal. 340, discussing payment of taxes as part of adverse possession; Minneapolis etc. Co. v. Traill Co., 9 N. Dak. 220, noted under People v. Lardner, 30 Cal. 243.

Municipal Ordinance is not wholly invalid because of invalidity of part, when this is separable, p. 504.

To same effect in San Luis Obispo v. Greenberg, 120 Cal. 306, as to void provision for appointment of tax collector, in license ordinance.

87 Cal. 505-507. **BALL v. KEHL.**

Injunction will be Denied subsequent appropriator of water without allegation that wrongful diversion will be continued, p. 506.

Approved in Mendelson v. McCabe, 144 Cal. 233, averment that grantee of right of way refused to desist and threatened to continue wrongful acts is sufficient for injunction in absence of special demurrer. See note 25 Am. St. Rep. 254.

87 Cal. 508-513. **HARLAN v. STUFFLEBEEM.**

Mechanic's Lien.—Contractor may file although trivial imperfections exist, when compensation may be made therefor, p. 511.

Cited in American etc. Co. v. Packer, 130 Cal. 463, discussing right to rescind in such case; Valley Lumber Co. v. Struck, 146 Cal. 273, where third payment was to be made when building completed and accepted by the architect, fact of payment after completion but before acceptance does not render payment invalid as to lien holders who had not given notice of claims.

Mechanic's Lien—Completion.—Question of substantial performance is one of fact for trial court, p. 512.

To same effect in Willamette etc. Co. v. Kremer, 94 Cal. 208, as to whether certain omission was a "trifling imperfection"; and on same point see Willamette etc. Co. v. College Co., 94 Cal. 238; and Joost v. Sullivan, 111 Cal. 292, holding certain matters to be such imperfections; Bianchi v. Hughes, 124 Cal. 27, but holding defect a substantial one under facts stated. Note citations: Crouch v. Gutmann, 30 Am. St. Rep. 616, on general subject.

Mechanics' Liens.—Owner's interest is liable for work ordered by lessee unless notice given under section 1192, Code of Civil Procedure, p. 513.

To same effect in Evans v. Judson, 120 Cal. 284, and Hurlbert v. Works, 47 Minn. 85, cited under West Coast etc. Co. v. Newkirk, 80 Cal. 275; Edwards etc. Co. v. Mosher, 88 Wis. 678, construing local statute; Title etc. Co. v. Wrenn, 35 Or. 68, 76 Am. St. Rep. 457, noted under Lumber Co. v. Newkirk, 80 Cal. 275.

87 Cal 514-520. **LATHAM v. CITY OF LOS ANGELES.**

Pueblo Grant is presumed to have been made with due authority, p. 518.

To same effect in Galvin v. Palmer, 113 Cal. 53, applying rule to deed from city under Black Point act.

87 Cal. 523-525. **UNDERWOOD v. UNDERWOOD.**

Order Vacating Judgment will be reversed only for abuse of discretion, p. 525.

To same effect in McGowan v. Kreling, 117 Cal. 36, as to vacation of default judgment; dissenting opinion in Horton v. New Pass Co., 21 Nev. 191, main opinion reversing order refusing to open default; Haynes v. Schwartz, 5 Wash. 434, as to granting of default after answer filed, but too late.

87 Cal. 526-529. **HARRIS v. SAN DIEGO FLUME CO.**

Agent.—Ostensible Authority cannot be asserted when party did not know of facts now relied upon as showing such authority, p. 528.

To same effect in Rodgers v. Peckham, 120 Cal. 243, holding evidence insufficient to show such authority; Goslinger v. Bank, 124 Cal. 227, 228, holding principal not bound under facts stated; Southern Pac. Co. v. Pomona, 144 Cal. 350, upholding dedication of land for street by lessee railroad company. Note citations: St. Louis etc. Co. v. Bennett, 22 Am. St. Rep. 190, on general subject.

Judicial Notice does not extend to necessity for employment of certain class of agent, p. 529.

See note to Harris v. Cameron, 29 Am. St. Rep. 897.

87 Cal. 530-532. **JUSTICE v. OTT.**

Guardian of Incompetent cannot be sued upon latter's authority, p. 531.

To same effect in O'Shea v. Wilkinson, 95 Cal. 456, and Dixon v. Cardozo, 106 Cal. 507, cited under Emeric v. Alvarado, 64 Cal. 593; concurring opinion in Estate of Callaghan, 119 Cal. 577, on point that appeal from order of distribution cannot be taken in name of guardian of minor heirs in own name.

87 Cal. 543. **CLARKE v. REIS.**

Police Insurance Fund.—Statutes on construed, p. 543.

Cited in Clarke v. Board, 123 Cal. 26, 127 Cal. 552, noted under **Pennie v. Reis**, 80 Cal. 266.

87 Cal. 545-552. **ROSENBERG v. DURFEE.**

Contributory Negligence of Infant.—Instruction examined and approved, p. 549.

Cited in dissenting opinion in Krenzer v. Railroad Co., 151 Ind. 600, 68 Am. St. Rep. 260, on point that question is one of fact for jury See note 49 Am. St. Rep. 411.

87 Cal. 552-557. **NORDHOLT v. NORDHOLT.** 22 Am. St. Rep. 268.

Constructive Trust arises under parol promise by grantee to grantor in confidential relation to transfer to another, when made without intent to perform, p. 555.

To same effect in Hayne v. Hermann, 97 Cal. 263, as to deed from husband to wife upon parol trust to deed part to daughter on his death; Ransdell v. Moore, 153 Ind. 419, noted under Brison v. Brison, 75 Cal. 525; Becker v. Schwerdtle, 141 Cal. 391, upholding complaint for relief for fraud where mother in expectation of death deeded land to son in confidence that in case of recovery he would pay monthly stipend for her support. Note citations: Larmon v. Knight, 33 Am. St. Rep. 233, on general subject.

87 Cal. 561-565. **SAN DIEGO FLUME CO. v. CHASE.**

Water.—Contract for supply of construed, p. 564.

Cited in Fresno etc. Co. v. Park, 129 Cal. 441, on point that such contracts are valid; and see San Diego etc. Co. v. National City, 174 U. S. 758, where case is cited but not discussed; San Diego Flume Co. v. Souther, 90 Fed. 168.

87 Cal. 566-568. **CAMPODONICO v. OREGON IMPROVEMENT CO.**

Mortgage Lien on Growing Crops is not lost by mortgagee permitting mortgagor to store crop in warehouse, p. 568.

Approved in Summerville v. Stockton etc. Co., 142 Cal. 544, removal of mortgaged wheat from land on which it was grown for its better security does not impair lien.

87 Cal. 569-576. McLENNAN v. BANK OF CALIFORNIA.

Statute as to time of filing decision is directory, p. 571.

Cited in Lynch v. Coviglio, 17 Utah, 108, noted under Vermule v. Shaw, 4 Cal. 214.

Credibility of Witness.—Evidence is not necessarily conclusive although uncontradicted, p. 574.

To same effect in Mattock v. Goughnour, 11 Mont. 273, when evidence improbable.

Evidence.—Books of bank are admissible, when original, to show its transactions with customers, p. 575.

To same effect in Pauly v. Pauly, 107 Cal. 24; 48 Am. St. Rep. 107, admitting like evidence.

87 Cal. 576-581. FRICK v. MORFORD.

Street Assessment.—Errors in estimating cost is cured unless appeal taken to supervisors, p. 579.

To same effect in Perine v. Forbush, 97 Cal. 312, as to like error, citing main case, also (p. 313), on point that appeal need not be taken when contract void; Dowling v. Conniff, 103 Cal. 77, as to like error, holding assessment not void; Girvin v. Simon, 116 Cal. 611, as to wrongful acceptance of work before completion.

Street Assessments.—Appeal need not be taken by owner when assessment illegal, p. 580.

To same effect in Chase v. Treasurer, 122 Cal. 545, when void for improper publication of notice of intention; De Haven v. Berendes, 135 Cal. 182, noted under Hewes v. Reis, 40 Cal. 263.

87 Cal. 581-588. BROCK v. PEARSON.

Amendment of Complaint does not destroy effect of lis pendens filed with original, p. 588.

See note to Norris v. Ile, 43 Am. St. Rep. 246, on general subject; and see note to Stout v. Philippi etc. Co., 56 Id. 869, citing main case as to effect of lis pendens.

87 Cal. 589-596. RUSS LUMBER ETC. CO. v. GARRETTSON.

Mechanic's Lien.—Notice held to show sufficiently that lien was claimed, p. 595.

Cited in Bringham v. Knox, 127 Cal. 44, 45, as to similar claim, and citing main case also on point that allegation of agreed price is suffi-

cient as to value in absence of special demurrer; Castagnetto v. Coppertown Min. etc. Co., 146 Cal. 333, upholding notice of lien stating labor was done "on that certain mining claim."

Mechanic's Lien.—Notice held sufficiently to state owner's name, p. 595.

To same effect in Curtis v. Sestanovich, 26 Oreg. 116, sustaining notice under local statute.

Mechanic's Liens.—Judgment against contractor is not necessary to support lien against owner, p. 596.

To same effect in Green v. Clifford, 94 Cal. 52, on point that contractor is not necessary defendant in action by materialman; and on same point in Yancy v. Morton, 94 Cal. 560.

87 Cal. 597-602. FINCH v. RIVERSIDE ETC. RY. CO.

Offices.—Municipal Franchise is invalid when subscriber to stock was member of board of trustees granting franchises, p. 601.

To same effect in Capital etc. Co. v. Young, 109 Cal. 143, but holding city liable for reasonable value of gas furnished it, although mayor was president and stockholder in gas company.

Street Railways.—Ejectment will lie for improper and unauthorized use of street by, p. 602.

To same effect in Railroad Co. v. Cape May, 58 N. J. Law, 569, on point that ordinance granting use of street must be strictly followed. Distinguished in Montgomery v. Railway Co., 104 Cal. 189, 196, 197; 43 Am. St. Rep. 92, 98, 99, where road constructed under municipal license; dissenting opinion in Peck v. Railway Co., 170 N. Y. 312, on point that such road is not such an additional servitude as will give owner of property right to compensation therefor. Note citations: Western etc. Co. v. Railroad Co., 25 Am. St. Rep. 478, on general subject.

87 Cal. 603-610. YARNELL v. CITY OF LOS ANGELES.

Municipal Corporation.—Legislature cannot delegate power to interfere with affairs of, p. 607.

To same effect in Woodward v. Fruitville etc. District, 99 Cal. 561, but sustaining act providing for formation of sanitary districts, as not necessarily such an interference.

Municipal Charter is void as to conflict with general laws on deposits of public moneys, p. 608.

Cited in Banaz v. Smith, 133 Cal. 104, noted under Thomason v. Ashworth, 73 Cal. 73.

Municipal Contract making depositary of bank allowing highest rate of interest is void as being a felony, p. 608.

To same effect in Los Angeles v. Bank, 100 Cal. 19, 23, on same facts as in main case and denying right of city to interest on withdrawal of deposit; Los Angeles v. Teed, 112 Cal. 329, 330, applying principle to ordinance making county bonds payable at particular bank in New York; People v. Wilson, 117 Cal. 243, 244, holding state officer liable for wrongful deposit of state moneys in bank, which afterward failed; San Diego v. Bank, 52 Fed. Rep. 62, allowing recovery from bank receiver of full amount of deposit, as having been illegally deposited; and see Independent District v. Beard, 83 Fed. Rep. 12, where case cited from argument of counsel.

County.—Moneys of coming into hands of its officers must be deposited with county treasurer, p. 608.

To same effect in People v. Hamilton, 103 Cal. 493, holding county clerk not obliged to pay such moneys in his hands to his successor.

87 Cal. 610-613. **HOYT v. SAN FRANCISCO ETC. CO.**

Appeal will be Dismissed when transcript not filed until after motion to dismiss made, although on same day, p. 611.

To same effect in Chapman v. Bank, 88 Cal. 420, but holding sufficient excuse shown for failure to file in time; Tompkins v. Montgomery, 116 Cal. 122, but denying motion when notice not shown to have been actually filed first. Distinguished in Scoville v. Anderson, 131 Cal. 595, 596, holding that fractions of day are to be disregarded in considering whether attachment was levied within one month of commencement of insolvency proceedings; note to State v. Michel, 78 Am. St. Rep. 383.

87 Cal. 613-615. **HASS v. WHITTIER ETC. CO.** S. C. 97 Cal. 412-421.

Insolvency—Fraudulent Conveyance.—Section 55 of Insolvent Act applies only to transfers intended to give a preference, p. 615.

To same effect in Salisbury v. Burr, 114 Cal. 456, 457, holding section not applicable to transfers not made to creditor, but amenable to section 3440, Civil Code.

87 Cal. 616-618. **SOUTHERN CAL. NAT. BANK v. WYATT.**

One Signing Joint Note as accommodation maker with word "surety" appended to signature is liable as maker, pp. 617, 618.

Approved in Randall v. Simmons, 40 Or. 558, where complaint alleged joint and several execution, for value, of note, which was not directly denied, but answer alleged that plaintiff knowing defendants were sureties relieved them by unauthorized extension to principal, admission of execution for value not inconsistent with defense of suretyship.

87 Cal. 619-629. **AVERY v. CLARK.** 22 Am. St. Rep. 272.

Vendor's Lien after transfer does not arise from express contract and is not assignable, p. 623.

To same effect in Woolley v. Wickerd, 97 Cal. 71, but holding lien not extinguished by transfer of all interest in judgment to be recovered in suit to foreclose lien; Claiborne v. Castle, 98 Cal. 33, 34, further holding parol evidence admissible to show waiver of lien; Longmaid v. Coulter, 123 Cal. 212, noted under Fitzell v. Leaky, 72 Cal. 477; McKeown v. Collins, 38 Fla. 288, 290, citing main case also as to loss of lien by taking of security. Note citations: Courtemanche v. Railway Co., 64 Am. St. Rep. 278, on general subject.

Vendor's Lien is Waived by taking of distinct independent security, p. 624.

Cited in Selna v. Selna, 125 Cal. 362, 363, 73 Am. St. Rep. 50, 51, noted under Fitzell v. Leaky, 72 Cal. 484; dissenting opinion in Featherstone v. Emerson, 14 Utah, 14, where note and mortgage were taken; Robbins v. Masteller, 147 Ind. 125, holding lien waived; dissenting opinion in Featherstone v. Emerson, 14 Utah, 27, discussing subrogation to mortgages taken as such security. Note citations: Maroney v. Boyle, 38 Am. St. Rep. 825, on general subject.

Vendor's Lien before transfer arises from contract, is assignable, and enforceable by assignee, p. 625.

To same effect in Gessner v. Palmateer, 89 Cal. 93, further holding such security to pass with assignment of purchase money notes and to defeat attachment thereon; Kent v. Williams, 114 Cal. 541, holding such lien not waived by taking of collateral security.

Mechanic's Lien is prior to mortgage executed after commencement of work, p. 627.

Cited in McClain v. Hutton, 131 Cal. 144, noted under Davies etc. Co. v. Gottschalk, 81 Cal. 642. See note 51 Am. St. Rep. 932.

Mechanic's Lien is given because laborers and materialmen have given value to property, p. 628.

Approved in Humboldt Lumber Mill Co. v. Crisp, 146 Cal. 688, claim for lien does not attach where buliding while uncompleted was destroyed by fire.

Mechanic's Liens.—Property is Liable unless notice given under section 1192, Code of Civil Procedure, p. 628.

To same effect in Jurgenson v. Diller, 114 Cal. 493; 55 Am. St. Rep. 85, but holding notice unnecessary in case of "drifting in tunnel." Cited also in Little Rock etc. Co. v. Spencer, 65 Ark. 191, as to policy of law, defining "contractor" under local statute.

87 Cal. 631-637. **WINN v. SHAW.**

County Funds.—Taxpayer may enjoin withdrawal for payment of invalid demand, p. 636.

To same effect in Barry v. Goad, 89 Cal. 222, as to injunction of board

of education from drawing drafts for payment of improperly authorized services; Irwin v. Eaton, 125 Cal. 626, but denying injunction against disposition of moneys collected as taxes to pay void bonds; McBride v. Newlin, 129 Cal. 37, and Johnston v. Sacramento County, 137 Cal. 210, noted under Linden v. Case, 46 Cal. 172.

87 Cal. 638-642. EX PARTE CLARK.

Adoption—Jurisdiction.—All parties interested must appear before superior court of county where adopting person resides, p. 640.

To same effect in In re Williams, 102 Cal. 77, 78; 41 Am. St. Rep. 166, 167, but holding that such fact may be shown by extrinsic parol evidence.

Adoption.—Proceedings are purely statutory and to be strictly construed, p. 641.

Cited in Sarazin v. Union R. R. Co., 153 Mo. 485, holding proceedings void under local statute. Distinguished and explained in In re Johnson, 98 Cal. 539-551, holding adoption shown by facts; and see Webb v. Jackson, 6 Colo. App. 214, and In re Renton's Estate, 10 Wash. 542. Cited under Estate of Stevens, 83 Cal. 322. Note citations: Van Matre v. Sankey, 39 Am. St. Rep. 215, 216, 218, on general subject.

Parents of Minor are not estopped from reclaiming its custody by leaving it in another's charge, p. 642.

To same effect in Markwell v. Pereles, 95 Wis. 422, holding father's right not waived. Note citations: Green v. Campbell, 29 Am. St. Rep. 849, on general subject.

87 Cal. 643-651. CORKER v. CORKER.

Will is Revoked by marriage unless marriage contract intended by court is executed, p. 647.

To same effect in Baacke v. Baacke, 50 Neb. 21, but holding no revocation shown. Note citations: Graham v. Burch, 28 Am. St. Rep. 359, on general subject.